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Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution

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Table of Contents

Introduction	335
I. Reforming Japan's Peace Constitution.....	337
A. Domestic Climate Ripe for Political Reform	339
B. Difficult International Political Climate	342
1. WWII Apology	343
2. Yasukuni Shrine	346
3. Textbook Controversy	352
4. Specific Bi-Lateral Disputes.....	354
i. China	354
ii. Korea	356
iii. Russia	357
II. History of Article 9.....	358
A. Original Intent	360
B. Rise of the SDF	361
C. The SDF Today	366
III. Constitutionality of the SDF under Article 9.....	368
A. Judicial "Response"	369
B. Executive & Legislative Interpretations of Article 9..	372
C. Legal Strategies for Finding the SDF Constitutional..	373
D. Legislative and Popular Support for Reform	375
IV. Constitutional Reform	376
V. The LDP's Reform Proposal	377
VI. Analysis and Recommendations.....	381
VII. Conclusion.....	388

Introduction

On November 22, 2005 the ruling coalition of Japan, the Liberal Democratic Party (LDP),¹ released a draft proposal to reform the Constitution.² For the first time since Japan's second

¹ Despite its name, the LDP is a politically conservative party that has been in continuous power in Japan since 1955, apart from ten months from 1993-94. *A Very Japanese Revolution*, ECONOMIST, Sept. 17-23, 2005, at 12.

² See Carl Freire, *Japan's Ruling Party Unveils Draft Constitution That Beefs Up*

constitution³ came into effect during the post-war occupation in 1947,⁴ revisionists finally stand a genuine chance of re-writing "the world's oldest unrevised constitution."⁵

The most significant change proposed by the LDP, and arguably the chief purpose of the draft revision, is to remove the war renunciation language of Article 9 of the constitution. The Article 9 language forbids Japan from possessing any war-making capabilities.⁶ Such a change would give definitive legal justification for the self-defense armed forces that Japan has possessed since shortly after the introduction of the post-war constitution.⁷ The changes would go even further, allowing Japan's forces to actively participate in international peacekeeping and collective defense actions, such as the United States-led war in Afghanistan and Iraq.⁸

While the LDP's proposed constitutional amendments would lend validity to Japan's seemingly unconstitutional quasi-military force, they would at the same time do harm to one of the constitution's primary principles, pacifism. In addition to re-defining the nation after WWII, pacifism also served as an effective apology that aided Japan in its post-war relations with its East Asian neighbors who were victimized by the Japanese army through horrible wartime atrocities.⁹ Japan is showing some troubling signs of returning to its nationalistic past, such as public

Military, ASSOCIATED PRESS, Nov. 22, 2005, available at Factiva.

³ For a fascinating discussion of Japan's first constitution, the Meiji Constitution, which legally established the emperor's absolute sovereignty, see Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 421-26 (1999).

⁴ James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 LAW & CONTEMP. PROBS. 171, 176 (1990).

⁵ GLENN D. HOOK & GAVAN MCCORMACK, JAPAN'S CONTESTED CONSTITUTION 3 (2001).

⁶ See Editorial, *Draft Revision Tosses Principles Aside*, JAPAN TIMES (Tokyo), Nov. 7, 2005, available at <http://search.japantimes.co.jp/cgi-bin/ed20051107a1.html> (registration required to access the article).

⁷ See Auer, *supra* note 4, at 176-77.

⁸ See Freire, *supra* note 2.

⁹ See Hiroyuki Sakai, Opinion, *Maintain the Constitution as Japan's Apology*, INT'L HERALD TRIBUNE (HERALD ASAHI) (Tokyo), Oct. 24, 2005, available at Factiva.

officials paying respects at a war shrine that contains the spirits of convicted war criminals and history textbooks that whitewash Japan's atrocities. Given this trend, the movement away from pacifism by removing the war renunciation language from the Constitution of Japan will likely aggravate tensions in an already volatile region.

I. Reforming Japan's Peace Constitution

The principle of pacifism, which has in part defined Japan's remarkable post-war success,¹⁰ is currently enshrined in Article 9 of the Constitution of Japan, which reads:

Chapter II: Renunciation of War

Article 9: Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.¹¹

The goal of pacifism is also bolstered by the preamble of the Constitution of Japan, which states:

We, the Japanese people[,] . . . resolve[] that never again shall we be visited with the horrors of war through the action of government[. We] desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence[,] trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace¹²

¹⁰ "In the course of half a century, Japan has moved from recipient of World Bank funds to second largest shareholder." Paul Wolfowitz, Editorial, *Japan, World Bank Must Tackle Poverty Together*, DAILY YOMIURI (Tokyo), Oct. 10, 2005, available at <http://www.worldbank.org> (follow "About" hyperlink, then follow "Organization" hyperlink in menu on left side of page, then follow "Office of President" hyperlink in menu on right side of page, then follow "Statements" hyperlink in menu on left side of page, then follow "Commentary" hyperlink under "Statements," follow "Japan, World Bank . . ." hyperlink).

¹¹ KENPŌ, art. 9.

¹² KENPŌ, pmbl.

Notwithstanding these provisions, the "Peace Constitution"¹³ did not prevent Japan from developing a quasi-military force. In fact, Japan began building this force in 1950, only three years after the constitution came into effect.¹⁴ Since that time, it has grown and developed to the extent that "Japan now has the fourth largest military (and by some counts the third) in the world measured by dollars spent."¹⁵ This apparent disconnect has led the LDP to push for a radical revision to the Constitution of Japan which would allow, according to one commentator, the creation of "a full-fledged military force that . . . would take part in . . . military operations abroad without restraint."¹⁶

In addition to actually explicitly referring to the right to a "self-defense military," the new constitutional draft's military would have the ability to engage in "international cooperation activities for the purpose of securing international peace."¹⁷ Instead of titling the second chapter "Renunciation of War," it would now be called "National Security."¹⁸ While the first section of Article 9 has not been touched, the second section, which bans a military force and renounces the right of belligerency, would be deleted altogether.¹⁹ While at one time such changes would have been unthinkable,²⁰ recent surges in nationalism, fear of Asian neighbors, and the popularity of LDP leadership appear to have opened the door to the real possibility of constitutional amendment.

¹³ Kenneth L. Port, *Article 9 of the Japanese Constitution, and the Rule of Law*, 13 CARDOZO J. INT'L & COMP. L. 127, 129 (2005).

¹⁴ See Auer, *supra* note 4, at 176.

¹⁵ Port, *supra* note 13, at 128.

¹⁶ See *Draft Revision Tosses Principles Aside*, *supra* note 6.

¹⁷ *Self-Defense Right Guaranteed by Draft*, INT'L HERALD TRIBUNE (HERALD ASAHI) (Tokyo), Oct. 29, 2005, available at Factiva.

¹⁸ *Id.*

¹⁹ *Draft Revision Tosses Principles Aside*, *supra* note 6.

²⁰ "The chance of passing such an amendment through the legislature is . . . extremely unlikely." Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines*, 32 CORNELL INT'L L.J. 393, 427 (1999).

A. Domestic Climate Ripe for Political Reform

Reform fever is currently sweeping Japan. In an effort to downsize its massive government, Japan recently privatized the national telecommunications company.²¹ Privatization of the Japanese Post²² will soon begin²³ and privatization of Japan's government-affiliated banks could soon follow.²⁴ This atmosphere for government change has led commentators to refer to it as the "biggest round of reforms since [the] Meiji Restoration[.]" the period where Japan began to westernize its culture at the end of the 19th Century.²⁵ The demand for reform has even spilled over to professional sports, with calls for changes in big league baseball financing.²⁶

One of the factors that may have led to this appetite for change is the first positively bullish outlook²⁷ for the Japanese economy after nearly fifteen years of stagnation.²⁸ Some signs of economic growth include the lowest level of unemployment since the late 1990s, rising wages, and property prices on the rise for the first

²¹ *Japan's Telecom Privatization Completed*, ASSOCIATED PRESS, Sept. 6, 2005, available at LEXIS.

²² Truly a monster of bureaucracy, the Japanese Post not only delivers the mail but with three trillion dollars in Japanese household financial assets, it is currently the largest financial institution in the world. *Koizumi Gets His Way*, ECONOMIST, Sept. 17-23, 2005, at 22.

²³ See *Postal Bills Finally Pass the Diet*, INT'L HERALD TRIBUNE (HERALD ASAHI) (Tokyo), Oct. 15, 2005, available at Factiva.

²⁴ See *Central Govt to Integrate, Privatize State Banks*, DAILY YOMIURI (Tokyo), Nov. 21, 2005, available at 2005 WLNR 18781893; *Koizumi's Last Shuffle*, ECONOMIST, Nov. 5-11, 2005, at 45.

²⁵ Anthony Faiola, *Japan's Koizumi Wins a Landslide Mandate for Change*, WASH. POST, Sept. 12, 2005, at A13. The Meiji Restoration is also referred to as the Meiji Revolution. See Hamano, *supra* note 3, at 419.

²⁶ See Takenori Emoto, Editorial, *It's Time for Baseball to Take a Chance on Reform*, INT'L HERALD TRIBUNE (HERALD ASAHI) (Tokyo), Nov. 5, 2005, available at Factiva.

²⁷ See Hugh Cortazzi, Editorial, *How Clear Is Japan's Future?*, JAPAN TIMES (Tokyo), Oct. 24, 2005, available at <http://search.japantimes.co.jp/cgi-bin/eo20051024hc.html> (registration required to access the article); Editorial, *The Sun Also Rises*, GUARDIAN (London), Nov. 14, 2005, at 8.

²⁸ See Editorial, *Rising Japan Follows Its Leader*, OBSERVER (London), Sept. 18, 2005, at 4.

time in over a decade.²⁹ One reason for this economic upturn is that "corporate restructuring has cut out some of the dead wood" after years of bad times.³⁰ In addition, China's exceptional growth has proven to be a healthy market for Japanese investment.³¹

Underlying social changes may have also played a part in this push for reform. Traditionally, Japanese people have been characterized as having "strong human relationships" and a sense of community-driven thought.³² An observer has noted that more recently there has been development of a new "group of individualistic Japanese who are not afraid . . . of being alone."³³ In addition, there have been many other significant changes, such as a considerable population decline³⁴ and rising crime³⁵ and suicide rates,³⁶ which could greatly affect how the Japanese view themselves. It is natural that persistent social changes could lead people to also seek changes in the mode of government that represents them.

Some argue that former Japanese Prime Minister Junichiro Koizumi³⁷ incorporated these changes into his bid to win a

²⁹ *Id.*; see *Average Land Values Rise for the First Time in 14 Years*, ASAHI (Tokyo), Aug. 2, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200608020085.html>.

³⁰ *Rising Japan Follows Its Leader*, *supra* note 28.

³¹ *See Koizumi Gets His Way*, *supra* note 22.

³² *See* Nobuo Noda, Editorial, *Poll Shows Erosion of Old Values*, DAILY YOMIURI (Tokyo), Sept. 16, 2005, available at 2005 WLNR 14618216.

³³ *Id.*

³⁴ *See Visions of 2020*, ECONOMIST, Oct. 8-14, 2005, at 16. The Japanese Ministry of Health has suggested that the current population of 128 million could drop to 100 million by 2050. *Id.* "By 2030, Japan will have only two workers for every retiree and, by mid-century, three workers for every two retirees." *Meet the New Salaryman*, ECONOMIST, Nov. 12-18, 2005, at 41.

³⁵ *See* Editorial, *Strengthening Public Safety*, JAPAN TIMES (Tokyo), Oct. 4, 2005, available at <http://search.japantimes.co.jp/cgi-bin/ed20051004a1.html> (registration required to access the article). In addition to rising crime generally, the terrorist nerve gas attacks on the Tokyo subway by the religious cult Aum Shinrikyo in 1995, killing 12 and sending 5,500 to the hospital, shook Japanese society to its core. *See* Kevin Rafferty, *Shoko Tactics*, GUARDIAN (London), May 16, 1995, at T2.

³⁶ *See The Sun Also Rises*, ECONOMIST, Oct. 8-14, 2005, at 6. "Suicides have soared, up more than 50 percent since 1990 to 34,500 in 2003." *Id.*

³⁷ Koizumi's self-given moniker is "Lionheart." *A Very Japanese Revolution*, *supra* note 1. Koizumi was a new kind of prime minister for Japan, with his long hair,

stunning snap election victory in 2005.³⁸ Frustrated by the efforts of a faction of the LDP, which defeated his reform bill for the Japanese Post, Koizumi took a huge gamble by “dissolv[ing] the lower house, call[ing] an election and refus[ing] to support the campaigns of the [thirty-seven] lower-house LDP members who had opposed it.”³⁹ Instead, seizing on cultural changes which devalued close ties,⁴⁰ Koizumi replaced the ousted LDP members with “a team of high-profile candidates—dubbed ‘assassins’ by Japan’s media”⁴¹ all the while “hammering” his mantra of postal reform.⁴² His gamble paid off, winning 296 of 480 legislature seats, the “biggest haul since 1986.”⁴³ Term limits required Koizumi to leave office and on September 26, 2006, Shinzo Abe, Chief Cabinet Secretary under Koizumi, was elected Japan’s newest prime minister.⁴⁴ It is undeniable that the LDP has a “remarkable mandate to enact a new stage of reforms in the world’s second-largest economy.”⁴⁵

Swept up in the reform fever,⁴⁶ the LDP is finally poised to

and “penchant[] for hard rock.” See Eric Talmadge, *Traditional Japan PM Touts Radical Reform*, ASSOCIATED PRESS, Sept. 11, 2005, available at LEXIS. He was the first Japanese prime minister to be a divorced father. *Id.* Koizumi did, however, come with the right pedigree, with a father and grandfather who held cabinet posts in past administrations. *Id.* He won the election for prime minister on a platform of reform after twelve terms in the Japanese legislature. *Id.*

³⁸ See Noda, *supra* note 32.

³⁹ *Koizumi Gets His Way*, *supra* note 22. This amounted to Koizumi’s risking “15% of the LDP’s pre-election strength.” *A Very Japanese Revolution*, *supra* note 1.

⁴⁰ See Noda, *supra* note 32.

⁴¹ *Koizumi Gets His Way*, *supra* note 22.

⁴² See *The Woodpecker and the Lumberjack*, *ECONOMIST*, Sept. 3-9, 2005, at 37.

⁴³ *Koizumi Gets His Way*, *supra* note 22.

⁴⁴ Martin Fackler, *New Premier Seeks a Japan With Muscle And a Voice*, N.Y. TIMES, Sept. 27, 2006, at A3.

⁴⁵ Faiola, *supra* note 25; see Takashi Oda, Editorial, *Public Expects Actions on Reform/Koizumi, ‘New LDP’ Have Obligation to Respond to Huge Mandate*, DAILY YOMIURI (Tokyo), Sept. 13, 2005, available at 2005 WLNR 14404637; Editorial, *Koizumi Has All the Sticks, All the Carrots*, DAILY YOMIURI (Tokyo), Sept. 23, 2005, available at 2005 WLNR 15019138. But see Editorial, *A Mandate and a Monopoly*, GUARDIAN (London), Sept. 12, 2005, at 34 (arguing that since Koizumi’s victory further entrenches the ruling party after fifty years of power, the message is ultimately that Japan does not want change).

⁴⁶ See *LDP Has Major Task in Reforming Top Law*, DAILY YOMIURI (Tokyo), Mar. 22, 2005, available at 2005 WLNR 4424398.

deliver the constitutional revisions that have been a core party platform since its inception.⁴⁷ Indeed, it was on the 50th anniversary of the LDP's formation that Koizumi unveiled his administration's draft proposal for constitutional reform.⁴⁸ The release also happened to roughly coincide with another important anniversary—the 60th anniversary of Japan's surrender in WWII.⁴⁹ The surrender ended WWII and led to the creation of the current constitution, which the LDP seeks to revise.⁵⁰

B. Difficult International Political Climate

Anniversaries aside, a constitutional amendment could not come at a worse time in terms of Japan's relationships with its East Asian neighbors.⁵¹ Indeed, a series of long-running disputes with individual nations has been underscored by more recent developments that many outsiders see as a frightening rise of Japan's political right-wing, heralding the return of the nationalism perceived to be behind Japan's atrocities during WWII.⁵² These feelings increasingly lead to distrust of and

⁴⁷ Isao Sato, *Revisionism During the Forty Years of the Constitution of Japan*, 53 LAW & CONTEMP. PROBS. 97, 97 (1990).

⁴⁸ See Editorial, *Constitutional Revision: The LDP Apparently Put Off Debate on Article 9*, JAPAN ECONOMIC NEWSWIRE, Oct. 30, 2005, available at LEXIS.

⁴⁹ See Justin McCurry, *Koizumi Apologizes for Wartime Wrongs*, GUARDIAN (London), Aug. 16, 2005, at 11.

⁵⁰ See Auer, *supra* note 4, at 172 (discussing how events in the American occupation following Japanese surrender led to the re-writing of the first constitution). The first constitution, known as the Meiji Constitution, was in effect for fifty years, approximately as long as the current Showa Constitution. See John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, 53 LAW & CONTEMP. PROBS. 73, 87 (1990).

⁵¹ Even though South Korea and Japan's relationship is certainly not the most contentious amongst Japan's East Asian neighbors, according to a Japanese Foreign Ministry official, the atmosphere between the two countries is currently the "worst ever." Lee Jin-woo, *S. Korea, Japan Hold Summit Today*, KOREA TIMES (Seoul), June 19, 2005, available at 2005 WLNR 9762625.

⁵² See Kwan Weng Kin, *Ambivalent Japanese Split Over War Responsibility*, CHINA DAILY (Beijing), Aug. 17, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-08/17/content_469871.htm; Opinion, *Japan Should Wake Up To History*, CHINA DAILY (Beijing), June 24, 2005, available at 2005 WLNR 10138708. One result of rising nationalism in Japan is a surge in popularity for xenophobic *manga*, Japanese comic books, which depict attractive Japanese with Westernized features saying outrageously offensive things about Koreans and Chinese, depicted as ignorant

hostility towards Japan.⁵³ Until Japan's neighbors feel more comfortable that Japan is not returning to the military aggressiveness of its past, they will likely be extremely wary of any changes to the absolute pacifism advocated in Japan's current constitution.⁵⁴

1. WWII Apology

Japan unquestionably committed horrible atrocities in WWII⁵⁵ and it is a common sentiment in East Asia that Japan is in denial of its war crimes.⁵⁶ This sentiment persists even in the face of repeated public apology for WWII wrongdoing from Japanese officials.⁵⁷ Many factors contribute to this opinion amongst East Asians unsatisfied by Japan's WWII apologies.

Some see Japan's apologies themselves as insufficient or defective in various ways.⁵⁸ For example, a Chinese newspaper

and backwards with prominent Asian features. See Norimitsu Onishi, *Ugly Images of Asian Rivals Become Best Sellers in Japan*, N.Y. TIMES, Nov. 19, 2005 at A1; *Ultrnationalist Manga Gain Popularity in Japan as Regional Tensions Rise*, MAINICHI DAILY(Tokyo), Dec. 1, 2005, available at <http://mdn.mainichi-mnsn.co.jp/features/archive/news/2005/12/20051201p2g00m0fe022000c.html>.

⁵³ See Gavin McCormack, *Rewriting an Ugly Past*, AGE, Aug. 15, 2005, available at <http://www.theage.com.au/news/opinion/rewriting-an-ugly-past/2005/08/14/1123957950490.html> (reporting that 90 percent of South Koreans do not trust Japan); *China Restaurant Bars Unapologetic Japanese*, CHINA DAILY (Beijing), July 13, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-07/13/content_459713.htm (describing a restaurant in China that insists Japanese patrons apologize for Japan's wartime aggressions before being served).

⁵⁴ See *Japan Should Wake Up To History*, *supra* note 52.

⁵⁵ See Gregory Clark, Editorial, *Look for Change Next Year*, JAPAN TIMES (Tokyo), Oct. 23, 2005, available at <http://search.japantimes.co.jp/print/ea20051023gc.html> (discussing notorious Unit 731's gas and germ warfare experiments on live prisoners, slave labor, and massacres in the extremities of the Japanese Empire) (registration required to access the article); *"Comfort Women" Recall War Crimes*, CHINA DAILY (Beijing), Aug. 12, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-08/12/content_468291.htm (describing the chilling experience of one of thousands of young women forced into wartime sex slavery for the Japanese military).

⁵⁶ See *"Comfort Women" Recall War Crimes*, *supra* note 55.

⁵⁷ See McCurry, *supra* note 49, at 11 (for an example of a recent apology on the 60th anniversary of WWII).

⁵⁸ See *Japan Should Wake Up to History*, *supra* note 52 (describing an apology as too vaguely worded); Hu Xiao, Opinion, *Tokyo Must Back Words with Action*, CHINA DAILY (Beijing), Aug. 16, 2005, available at Factiva.

was quick to point out that a legislative draft resolution apologizing for WWII on its 60th anniversary was a toned down version of a similar resolution in 1995.⁵⁹ The draft this time removed the words “acts of aggression” and “colonial rule,” and instead apologized for “our country’s actions.”⁶⁰ Critics also point to missed opportunities for Japan to make sincere and meaningful apologies, such as during a joint declaration on history issues between Japan and China in 1998.⁶¹

Because so much time has passed, one could argue that an apology is no longer necessary, but the reality is that Japan’s WWII legacy remains very much alive today. In the past decade alone, many Chinese have been killed or injured by chemical weapons abandoned by Japan at the end of the war.⁶² Moreover, Japan is faced with regular civil suits for damages suffered by East Asians at the hands of the Japanese.⁶³ While Japanese courts are sometimes willing to admit guilt, damage awards are rare.⁶⁴ It is doubtful that this problem will disappear with Koizumi, since newly elected Prime Minister Abe took the unprecedented step prior to the election of refusing to formally endorse what had been the government’s official apology since 1995. Instead, he merely indicated that he would “not negate the spirit” of the apology.⁶⁵ While Abe did eventually cave to political pressure by agreeing to honor the official apology, his initial hesitation is nevertheless

⁵⁹ *WWII Draft Not to Cite “Aggression”*, CHINA DAILY (Beijing), July 28, 2005, available at Factiva.

⁶⁰ *Id.*

⁶¹ *Japan Should Wake Up to History*, *supra* note 52.

⁶² See Fu Jing, *Japan Apology for Chemical Injuries*, CHINA DAILY (Beijing), June 28, 2005, available at Factiva.

⁶³ See *Chinese Laborers Demand Tokyo’s Apology*, PEOPLE’S DAILY (Beijing), July 3, 2004, available at http://english.peopledaily.com.cn/200407/03/eng20040703_148383.html; *Tokyo Court Rejects Germ Warfare Appeal*, CHINA DAILY (Beijing), July 20, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-07/20/content_461566.htm.

⁶⁴ See *Chinese Laborers Demand Tokyo’s Apology*, *supra* note 63; *Tokyo Court Rejects Germ Warfare Appeal*, *supra* note 63.

⁶⁵ See *Abe Dodges Issue of Stance Over World War II ‘Remorse’*, ASAHI (Tokyo), Sept. 8, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200609080204.html>.

telling.⁶⁶

Another factor that mars international acceptance of Japanese apologies for imperial aggression are informal statements by public officials that undermine the sincerity of formal apologies. For example, Japanese Education Minister Nariaki Nakayama recently stated—referring to the internationally recognized problem of sex slaves forcibly drafted into the Japanese military—that such “comfort women” never existed.⁶⁷ While this statement prompted rapid correction by Koizumi’s administration, much of the damage had already been done in terms of international opinion.⁶⁸ Furthermore, critics point to growing popular nationalist sentiment within Japan that also downplays Japan’s war guilt. A recent editorial in *The Japan Times* admits war crimes, while at the same time claiming that “Tokyo never resorted to anything quite as grubby as Britain’s Opium War against China.”⁶⁹ The war museum at the Yasukuni Shrine goes so far as to portray Japan’s part in WWII as a “heroic effort[] to liberate Asia.”⁷⁰

An additional area of difficulty is the treatment of Japanese war criminals at the Tokyo Trials following Japan’s surrender. Many within Japan view the outcome as “victor’s justice[.]”⁷¹ More than one thousand Japanese Class B and C war criminals were executed while allied forces were ignored, despite the devastating fire bombings of Japan, not to mention two nuclear strikes.⁷² However, of the more important Class A Japanese war crime suspects and convicts, many went on to positions of great prominence in Japan.⁷³ For example, Okinori Kaya became justice

⁶⁶ See *Abe to Honor Ex-PMs’ China Apologies*, DAILY YOMIURI (Tokyo), Oct. 3, 2006, available at LEXIS.

⁶⁷ *Japan Sorry for Sex Slaves in World War II*, CHINA DAILY (Beijing), June 13, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-06/13/content_450997.htm.

⁶⁸ *Id.*

⁶⁹ Clark, *supra* note 55.

⁷⁰ *The Ambiguity of Yasukuni*, ECONOMIST, Oct. 8-14, 2005, at 15.

⁷¹ McCormack, *supra* note 53. Current Prime Minister Abe has thus far not “accepted the validity of the Tokyo [T]rials[.]” unlike Koizumi. Norimitsu Onishi, *Japan’s Likely Next Premier in Hawkish Stand*, N.Y. TIMES, Sept. 2, 2006, at A6.

⁷² *Id.*

⁷³ See Editorial, *Time Ripe for Review of War Responsibility*, DAILY YOMIURI (Tokyo), Aug. 15, 2005, available at <http://www.findarticles.com/p/articles/>

minister,⁷⁴ Mamoru Shigemitsu became foreign minister,⁷⁵ and Nobosuke Kishi, current Prime Minister Abe's grandfather,⁷⁶ took the highest public office in Japan, that of prime minister.⁷⁷

Perhaps the most effective apology for Japan's war crimes is the war renunciation provisions in the current pacifist constitution. Should the Constitution remain as is, Japan's neighbors can at least feel assured that Japan will not pursue aggressive military action due to the legal prohibition in the current Constitution. Since many view Article 9 in this way,⁷⁸ Japan should take extra care in its efforts to make revisions.⁷⁹

2. Yasukuni Shrine

Arguably the most emotionally-charged issue in Japanese-East Asian relations in recent years was Koizumi's repeated annual visits to the Yasukuni war shrine. Founded in 1869, Yasukuni is a Shinto shrine which honors the spirits of the 2.5 million Japanese war dead since 1853.⁸⁰ Most troubling, however, is the inclusion of fourteen Class A war criminals executed at the Tokyo Trials in 1948, whose spirits are inseparable from the other spirits and cannot be excluded from worship.⁸¹ In addition, the war museum located at the shrine treats Japan's war history as an ultimately positive experience for East Asia.⁸² The shrine's website

mi_m0WDQ/is_2005_August_22/ai_n14940850.

⁷⁴ *Id.*

⁷⁵ Editorial, *Govt Must Expedite New War Memorial*, DAILY YOMIURI (Tokyo), June 4, 2005, available at 2005 WLNR 8961522.

⁷⁶ See Hiroko Nakata, *Abe's Conservative Lineage Runs Deep*, JAPAN TIMES (Tokyo), Sept. 7, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060907f2.html> (registration required to access the article).

⁷⁷ McCormack, *supra* note 53.

⁷⁸ See Yu Yoshitake, Editorial, *Playing the Constitution as a Diplomatic Card*, INT'L HERALD TRIBUNE (HERALD ASAHI) (Tokyo), May 23, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁷⁹ See Sakai, *supra* note 9.

⁸⁰ *The Ambiguity of Yasukuni*, *supra* note 70.

⁸¹ *Id.* In 1959, Yasukuni also secretly enshrined the spirits of 353 Class B and C war criminals. Shuichi Yutaka & Yu Miyaji, *Yasukuni in Secret Deal on Enshrining Lesser-Ranked War Criminals*, ASAHI (Tokyo), Aug. 11, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200608110131.html>.

⁸² See *The Ambiguity of Yasukuni*, *supra* note 70.

announces "the truth of modern Japanese history is now restored."⁸³

Koizumi's insistence on remaining faithful to his campaign promise to visit the shrine annually compounded the problem.⁸⁴ Though he admitted that some of those enshrined are genuine war criminals, he nevertheless went to worship, as have prime ministers before him.⁸⁵ Koizumi stated that his visits were "not to beautify the history, but to pay tribute to those forced to be in the war and swear that Japan should not bring on war again."⁸⁶ China nevertheless responded by saying that Koizumi has "swallowed" his apology for WWII by insisting on visits to the shrine.⁸⁷

Regardless of Koizumi's statements, his shrine visits have caused virtually nothing but uproar abroad.⁸⁸ The most ardent critic is China, which "staunchly oppose[s]"⁸⁹ each visit, viewing it as a "grave provocation to the Chinese people."⁹⁰ In an official statement after Koizumi's fifth visit on October 17, 2005, the

⁸³ *Id.*

⁸⁴ Brad Glosserman, Editorial, *A Koizumi Promise Not Worth Keeping*, JAPAN TIMES (Tokyo), Oct. 26, 2005, available at <http://search.japantimes.co.jp/cgi-bin/eo20051026bg.html> (registration required to access the article). Though their influence may be on the decline, the LDP has long relied heavily on the support of widows of the war-dead, referred to as "Yasukuni wives." See *Kin of War-Dead Finding Political Clout on Wane*, JAPAN TIMES (Tokyo) Nov. 18, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051118f4.html> (registration required to access the article).

⁸⁵ See Glosserman, *supra* note 84.

⁸⁶ Ryu Jin, *Roh, Koizumi Disagree on War History*, KOREA TIMES (Seoul), June 21, 2005, available at 2005 WLNR 9819549.

⁸⁷ See *China Says Meeting with Japan and South Korea Postponed Amid Yasukuni Shrine Tension*, MAINICHI DAILY (Tokyo), Dec. 4, 2005, available at LEXIS.

⁸⁸ Even the United States, one of Japan's strongest supporters, distanced itself from Koizumi's actions, as evidenced by the State Department's repeated referral to the issue as "region-specific." See Glosserman, *supra* note 84.

⁸⁹ *Koizumi Makes Fifth Visit to Yasukuni Shrine*, ASAHI (Tokyo), Oct. 17, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁹⁰ Justin McCurry, *Beijing Furious After Japanese PM Pays New Visit to War Dead Shrine*, GUARDIAN (London), Oct. 18, 2005, at 16. In addition to direct words of displeasure about the visit, Chinese Premier Wen Jiabao also personally snubbed Koizumi by refusing to honor a request by Koizumi to borrow a pen at the East Asia Summit. Eventually Malaysian Prime Minister Abdullah Ahmad Badawi intervened. See *Pen Mightier Than Sword as Chinese Leader Puts Frosty Relations With Japan on Display*, ASSOCIATED PRESS, Dec. 14, 2005, available at Factiva.

Chinese ambassador to Japan expressed “strong indignation” towards the Japanese prime minister’s “willful injury of Chinese feelings and dignity, and serious wrongdoings to hurt” relations between the two countries.⁹¹ Chinese Foreign Minister Li Zhaoxing even went so far recently as to liken Yasukuni to the idea of a memorial in Germany honoring Hitler.⁹²

Koizumi’s sixth and final visit to Yasukuni was on August 15, 2006, the anniversary of Japan’s surrender.⁹³ The last time a prime minister visited Yasukuni on August 15—described as “the most diplomatically explosive date possible”⁹⁴—was in 1985.⁹⁵ Within Japan, Koizumi’s visit enjoyed overall general approval from the public⁹⁶ and, shockingly, even prompted a nationalist to burn down the house of LDP politician Koichi Kato, a critic of Koizumi.⁹⁷ Although Koizumi’s sixth visit was expected, it nevertheless occasioned a “fresh wave of anger” from China and South Korea.⁹⁸

In addition to strong words, China has also taken action against Japan. While taking precautions to avoid violent anti-Japan protests at home, China has been systematically “replacing high-ranking participants in Japan-related events with lower-level

⁹¹ McCurry, *supra* note 90, at 16. In 2006 China’s Foreign Minister Li Zhaoxing described Koizumi’s Yasukuni visits as “stupid.” *Abe Lashes Back at China Over Yasukuni Visit Rebuke*, MAINICHI DAILY (Tokyo), Mar. 8, 2006 (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁹² *China Playing the Hitler Card*, JAPAN TIMES (Tokyo), Nov. 16, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051116a3.html> (registration required to access the article).

⁹³ See Norimitsu Onishi, *Koizumi Exits Office as He Arrived: Defiant on War Shrine*, N.Y. TIMES, Aug. 16, 2006, at A6.

⁹⁴ Justin McCurry, *Koizumi Ignores Protests in Final Shrine Visit*, GUARDIAN (London), Aug. 16, 2006, at 16.

⁹⁵ See *Defiant Koizumi Unbowed by Memo*, DAILY YOMIURI (Tokyo), Aug. 17, 2006, available at LEXIS.

⁹⁶ See *Over 50% Approve of Yasukuni Shrine Visit*, DAILY YOMIURI (Tokyo), Aug. 17, 2006, available at LEXIS.

⁹⁷ See *Suspected Arsonist Member of Right-Wing Group*, DAILY YOMIURI (Tokyo), Aug. 17, 2006, available at LEXIS. After the attack, the arsonist attempted to commit suicide by ritual disembowelment but apparently failed. See *Rightist Linked to Arson of Kato’s Home*, ASAHI (Tokyo), Aug. 17, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200608170082.html>.

⁹⁸ Anthony Faiola, *Koizumi Visits War Shrine Despite Protests*, WASH. POST, Aug. 15, 2006, at A10.

officials.”⁹⁹ It seems likely that diplomatic relations will remain icy for some time, considering that Chinese Vice Premier Wu Yi “abruptly cancelled a scheduled meeting” in 2006 simply because Koizumi suggested that he may visit the shrine again.¹⁰⁰ It appears very unlikely that the current prime minister will satisfy China in this regard. Although Abe, unlike Koizumi, has not pledged to attend Yasukuni annually,¹⁰¹ he is nevertheless a self-avowed supporter of Yasukuni visits who would “like [them] to continue[.]”¹⁰²

South Korea has also been highly disappointed by Koizumi's repeated Yasukuni visits, expressing “deep regret and disappointment” in response to his fifth visit.¹⁰³ South Korea indicated that, in light of these circumstances, a previously planned Japan-South Korea summit with President Roh Moo-hyun scheduled for 2005 would be impossible without a satisfactory Japanese response on the Yasukuni issue.¹⁰⁴ In a more positive sign, South Korean Foreign Minister Ban Ki Moon ultimately decided not to cancel a trip to Japan despite threats to do so.¹⁰⁵

⁹⁹ *China Pulls VIPs from Friendship Events*, ASAHI (Tokyo), Oct. 25, 2005, available at Factiva.

¹⁰⁰ Naohito Maeda, *Koizumi's Latest Shrine Visit Has Everyone Looking to His Successor*, ASAHI (Tokyo), Oct. 18, 2005, available at Factiva.

¹⁰¹ See Reiji Yoshida, *Abe Looking to Beef Up Defense Posture*, JAPAN TIMES (Tokyo), Sept. 7, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060907f1.html> (registration required to access the article); *Abe Dodges Issue of Stance Over World War II 'Remorse'*, *supra* note 65.

¹⁰² *Koizumi Reshuffles Cabinet/3 Possible Successors—Abe, Aso, Tanigaki—Get Key Posts*, DAILY YOMIURI (Tokyo), Nov. 1, 2005, available at 2005 WLNR 17993371. Furthermore, Abe has suggested that he, unlike Koizumi, does not distinguish between the war criminals and the other war dead enshrined at Yasukuni. See Reiji Yoshida, *War Criminals, War Dead Same: Abe*, JAPAN TIMES (Tokyo), Nov. 17, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051117a3.html> (registration required to access the article).

¹⁰³ *Koizumi Makes Fifth Visit to Yasukuni Shrine*, *supra* note 89.

¹⁰⁴ See *Seoul Demands Apology Over Yasukuni Before Summit*, JAPAN TIMES (Tokyo), Oct. 25, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051025a3.html> (registration required to access the article). After poor discussions between Roh and Koizumi at the Asia-Pacific Economic Cooperation forum summit, South Korea formally ruled out a previously scheduled visit to Japan in December of 2005. Hayami Ichikawa, *Seoul: Don't Expect Roh to Visit Japan This Year*, ASAHI (Tokyo), Nov. 29, 2005, available at LexisNexis Academic.

¹⁰⁵ See *China Pulls VIPs from Friendship Events*, *supra* note 99.

Criticism for Koizumi's Yasukuni shrine visits has not only come from foreign leaders but also from within Japan. While polls show that a slight majority of Japanese support Koizumi's visits,¹⁰⁶ at least some public figures have spoken out against them.¹⁰⁷ The Minister of Disaster Management and the Construction and Transport Minister publicly expressed regret over Koizumi's fifth visit.¹⁰⁸ Additionally, a recent Osaka high court decision ruled Koizumi's visits are in a public capacity and as such are an unconstitutional violation of the separation of religion and state.¹⁰⁹ However, a Tokyo high court rendered an opposite verdict the day before, indicating that Koizumi's visits were in his private capacity.¹¹⁰ Regardless of the verdict, such decisions have little chance of preventing the prime minister from visiting the shrine, considering the lack of "binding power on the executive . . . branch[.]" and the little-covered fact that this aspect of both opinions was actually dicta.¹¹¹

There are some signs that Koizumi heeded the heavy criticism of his repeated Yasukuni visits. On his fifth visit, Koizumi made several changes to his traditional manner of worship to support his assertion that he visits as a private individual rather than as a

¹⁰⁶ See *Over 50% Approve of Yasukuni Shrine Visit*, *supra* note 96; McCurry, *supra* note 90.

¹⁰⁷ The newly elected leader of the opposition party, the DPJ, Ichiro Ozawa, openly criticized Koizumi's visit. *Ozawa Strikes Out at Yasukuni Visits*, ASAHI (Tokyo), May 12, 2006 (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹⁰⁸ *Cabinet Divided Over Visit*, DAILY YOMIURI (Tokyo), Oct. 19, 2005, available at 2005 WLNR 16926099.

¹⁰⁹ See *Court Decision a Warning to Koizumi*, ASAHI (Tokyo), Sept. 30, 2005, available at Factiva.

¹¹⁰ See *id.*

¹¹¹ Reiji Yoshida, *High Courts Not on the Same Page on Yasukuni Visits*, JAPAN TIMES (Tokyo), Oct. 5, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051005f1.html> (registration required to access the article). The principal opinion in both rulings held that the plaintiffs had no standing to sue the federal government due to lack of injury. See *id.* Interestingly, the LDP's draft constitution "implicitly allows government officials to support religious activities within the bounds of social courtesy, manners[,] and customs—an apparent move to justify official visits to religious institutions such as Yasukuni Shrine." *Draft Revision Tosses Principles Aside*, *supra* note 6.

public official.¹¹² For example, he wore a business suit rather than formal Japanese attire, did not sign the guestbook as prime minister, and did not enter the main hall of the shrine.¹¹³ Possibly undermining such efforts, the day after Koizumi's fifth visit, 101 Japanese lawmakers visited the shrine en masse in a show of solidarity and support.¹¹⁴ Furthermore, on his sixth and final visit, Koizumi reverted back to wearing a formal tuxedo, signed the guest book as Prime Minister Junichiro Koizumi, and entered the main hall of the shrine.¹¹⁵

In an effort to sidestep Japanese nationalist pride without ruining relations with China and South Korea, some are pushing for the construction of a new, secular outdoor memorial akin to Arlington National Cemetery.¹¹⁶ One promising site that has received some consensus is Shinjuku Gardens near the center of government in Tokyo.¹¹⁷ More recent suggestions, equally promising, include a plan to remove Class A war criminals from enshrinement¹¹⁸ or to convert Yasukuni into a public institution.¹¹⁹

¹¹² See *Koizumi Makes Fifth Visit to Yasukuni Shrine*, *supra* note 89. Minister of Foreign Affairs Nobutaka Machimura compared the visit to "a Christian having a right to go to church." Park Song-wu, *Tokyo Wants Roh to Visit Japan: Machimura*, KOREA TIMES (Seoul), Oct. 19, 2005, available at 2005 WLNR 16946211.

¹¹³ *Koizumi Makes Fifth Visit to Yasukuni Shrine*, *supra* note 89.

¹¹⁴ See *101 Lawmakers Visit Yasukuni Shrine*, ASAHI (Tokyo), Oct. 18, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹¹⁵ See *Defiant Koizumi visits Yasukuni*, JAPAN TIMES (Tokyo), Aug. 16, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060816a1.html> (registration required to access the article); Onishi, *supra* note 71; *Koizumi Goes Ahead With Shrine Visit*, ASAHI (Tokyo), Aug. 16, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200608160169.html>.

¹¹⁶ See Kakunosuke Akiyama, Editorial, *Japan Needs a National Cemetery for War Dead*, Asahi (Tokyo), Sept. 5, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200609050097.html>; *Govt Must Expedite New War Memorial*, *supra* note 75; Editorial, *War Memorial*, JAPAN ECONOMIC NEWSWIRE, Nov. 11, 2005, available at LEXIS. Koizumi himself has promised considering such a facility. *Id.* However, Koizumi has, to a certain extent, stepped back his commitment to the new memorial by "correct[ing] his words from 'promised' to 'said.'" Jin, *supra* note 86.

¹¹⁷ See *Govt Must Expedite New War Memorial*, *supra* note 75; Makiko Tanaka, Editorial, *Koizumi Just Another Old-Guard LDP Politician*, ASAHI (Tokyo), Nov. 2, 2005, available at Factiva.

¹¹⁸ See Editorial, Yoshibumi Wakamiya, *Now Is the Time to Consider the Alternatives*, ASAHI (Tokyo), Aug. 16, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200608150555.html>; *Yamasaki OK with Class-A*

However, with prominent politicians continuing to publicly voice support for continued Yasukuni visits, this issue will likely dominate domestic politics for the foreseeable future.¹²⁰

3. Textbook Controversy

Another issue sparking much protest from China and South Korea is the use in some Japanese schools of history textbooks that downplay Japan's wartime atrocities. For example, in 1997, all junior high school history textbooks contained passages about the use of sex slave "comfort women" during the war.¹²¹ By 2005, only "two of eight acknowledge[d] them."¹²² Also, the 1997 edition of one textbook stated that "700,000 people were forcibly taken to Japan between 1939 and 1945 [as laborers]" while the latest edition merely says "[t]here were Koreans and Chinese who were brought to Japan and made to work against their will."¹²³

A group lobbying for such changes, the Japanese Society for History Textbook Reform, or *Tsukurukai*,¹²⁴ argues that the old "masochistic education" program made "the youth lose their pride and confidence in their own country."¹²⁵ Despite the fact that the *Tsukurukai*-sponsored "New History Textbook"¹²⁶ is currently only used by 0.44 percent of the overall junior high school

Removal, ASAHI (Tokyo), July 24, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200607240138.html>.

¹¹⁹ See Hiroshi Oyama & Tetsuya Ennyu, *Aso Suggestion for Yasukuni Shrine Stirs Up Debate*, DAILY YOMIURI (Tokyo), Aug. 10, 2006, available at LEXIS; *Head Priest Positive on Proposal*, DAILY YOMIURI (Tokyo), Aug. 10, 2006, available at LEXIS; Editorial, *Yasukuni Issue*, ASAHI (Tokyo), Aug. 10, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200608100124.html>; Yu Nogami, Editorial, *Can Old Twist on Old Plot Defuse Yasukuni?*, ASAHI (Tokyo), Aug. 9, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200608090131.html>.

¹²⁰ See *Cabinet Moves Push Reform*, ASIA AFRICA INTELLIGENCE WIRE, Nov. 1, 2005, available at LEXIS.

¹²¹ See Norimitsu Onishi, *In Japan's New Texts, Lessons in Rising Nationalism*, N.Y. TIMES, Apr. 17, 2005, at WK 4.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Tokyo District Adopts History Row Textbook*, CHINA DAILY (Beijing), Aug. 13, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-08/13/content_468638.htm.

¹²⁵ Onishi, *supra* note 121.

¹²⁶ *Tokyo District Adopts History Row Textbook*, *supra* note 124.

population, that nevertheless represents a tenfold increase since 2001.¹²⁷ Based on this success, *Tsukurukai* plans to expand its influence by creating a junior high school geography textbook as well.¹²⁸

The success of nationalist-toned textbooks in Japan has not gone unnoticed abroad. Japan's April approval of the latest version of the *Tsukurukai* book sparked a series of "violent anti-Japanese demonstrations"¹²⁹ in China, the largest "since the two countries re-established relations in 1972."¹³⁰ In addition, a petition was signed by 80,000 Chinese demanding that Japan publish a more accurate account of its forced labor during the war.¹³¹ South Korea has also criticized the textbook revisions, claiming they try to "justify a colonial past."¹³² It is likely that Japan's noticeable trend towards nationalist textbook revision will continue to cause great friction with neighboring countries, particularly since Prime Minister Abe is known for his "support[of] nationalist scholars in their efforts to revise school textbooks[.]"¹³³

An even more recent trend towards outright nationalism in education will not ease tensions with Japan's East Asian neighbors. Prior to the American occupation at the end of WWII, the Imperial Rescript of Education promulgated ultra-nationalistic requirements such as instituting the worship of the emperor as a civic duty for all citizens.¹³⁴ Now, the LDP and coalition party partner Komeito have agreed to update the language of the American-promulgated replacement to the Imperial Rescript, the Fundamental Law of Education. The revisions will "emphasize

¹²⁷ Akemi Nakamura, *Textbook Revisionists Plan to Diversity*, JAPAN TIMES (Tokyo), Sept. 3, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20050903a2.html> (registration required to access the article).

¹²⁸ See *id.*

¹²⁹ McCurry, *supra* note 90.

¹³⁰ Onishi, *supra* note 121.

¹³¹ See *Chinese Laborers Demand Tokyo's Apology*, *supra* note 63.

¹³² Onishi, *supra* note 121.

¹³³ Onishi, *supra* note 71.

¹³⁴ KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 30 (1996).

love of Japan [and] to nurture patriotism.”¹³⁵ Furthermore, in the Saitama prefecture, many schools have begun grading pupils on patriotism and love of the nation.¹³⁶ In one Saitama city, the board of education went so far as to “hunt[] down guests who did not stand up and sing” a nationalistic anthem during a spring graduation and enrollment ceremony.¹³⁷

4. *Specific Bi-Lateral Disputes*

i. *China*

An additional dispute that has recently plagued Japan-China relations is the discovery and exploration of natural gas and oil fields in the East China Sea, at a location approximately equidistant between the two nations.¹³⁸ Though bi-lateral drilling rights discussions have not been finalized, there is evidence suggesting that two Chinese drilling platforms are already in operation.¹³⁹ To make matters worse, China has sent naval destroyers and frigates to patrol the areas surrounding the platforms.¹⁴⁰ In response, Japan has granted drilling rights to the Japanese company Teikoku Oil.¹⁴¹ If Teikoku proceeds with

¹³⁵ *Ruling Camp Agrees on Patriotism Under New Education Law*, JIJI PRESS TICKER SERVICE, Apr. 12, 2006, available at LEXIS.

¹³⁶ *See Headache for Saitama Teachers; Schools Grade Kids on Patriotism*, ASAHI (Tokyo), May 27, 2006 (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹³⁷ *Board Seeks Guests Who Sat During “Kimigayo”*, ASAHI (Tokyo), June 21, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200606210153.html>. After a similar circumstance, the Tokyo District Court recently ruled in 2006 that teachers could not be forced to stand and sing the national anthem. *See Teachers Not Obligated to Stand and Sing Anthem, Court Rules*, ASAHI (Tokyo), Sept. 22, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200609210422.html>. The Board of Education has indicated that it will appeal. *Id.*

¹³⁸ *See Anthony Faiola, Japan-China Oil Dispute Escalates*, WASH. POST, Oct. 22, 2005, at A17.

¹³⁹ *See id.* A recent poll showed that “[s]eventy percent of Japanese think China should suspend unilateral development” of the oil and natural gas fields. *Poll: 70% Want China to Suspend Gas Drilling*, DAILY YOMIURI (Tokyo), Oct. 18, 2005, available at 2005 WLNR 16874952.

¹⁴⁰ *See Oil and Gas in Troubled Waters*, ECONOMIST, Oct. 8-14, 2005, at 52.

¹⁴¹ *See id.* Unfortunately, the fact that Teikoku Oil translates to Imperial Oil will not likely put China at ease. *See id.*

drilling before negotiations have concluded, particularly if accompanied by "an escort of Japanese coast guard vessels," this would be viewed by China "as an invasion of Chinese territory and . . . a highly provocative act."¹⁴²

The deteriorating political relationship with China has caused Japan to lose out on some otherwise lucrative development projects in China.¹⁴³ For example, because of the Yasukuni issue, China decided against importing Japan's Shinkansen bullet train technology.¹⁴⁴ Additionally, in Japan, deterioration of the political relationship has caused a significant decline in high school field trips to China.¹⁴⁵ Furthermore, officials on both sides have made provocative comments, such as a Chinese general who indicated a readiness to use nuclear weapons¹⁴⁶ and comments from Tokyo's

¹⁴² Faiola, *supra* note 138. Japan has also been on the lookout for provocation, having scrambled its fighter jets thirty times this year, a record, to respond to Chinese aircraft approaching Japanese airspace. *See Fighters Scrambled Record 30 Times to Intercept Chinese Planes*, JAPAN TIMES (Tokyo), Nov. 10, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051110a1.html> (registration required to access the article). Since then, in April, 2006, China instituted a shipping ban in the regions surrounding the gas field. *China Bans Vessels Near Gas Field: Report*, JAPAN TIMES (Tokyo), Apr. 17, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060417a1.html> (registration required to access the article). Immediately afterwards, however, China reversed the ban, referring to it as a "technical mistake." Reiji Yoshida, *Shipping Ban in Japan Zone Mistake: China*, JAPAN TIMES (Tokyo), Apr. 19, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060419a2.html> (registration required to access the article).

¹⁴³ The poor relationship has not, however, stopped China from buying more electronics and cars from Japan than ever. *See Ralph Jennings, Chinese Feelings on Japan Mixed*, JAPAN TIMES (Tokyo), Nov. 11, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051111f2.html> (registration required to access the article).

¹⁴⁴ Tanaka, *supra* note 117. China appears to have changed its mind in this matter and has since agreed to invest in Shinkansen technology. Kazumasa Higashi, *Shinkansen on Track for China Network*, DAILY YOMIURI (Tokyo), Nov. 22, 2005, available at 2005 WLNR 18866382.

¹⁴⁵ *See China Drops from 1st to 4th as Destination for High School Trips*, ASAHI (Tokyo), Oct. 26, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation). A recent poll has indicated that positive feelings for China within Japan are at the lowest level since 1978. *Fewer Japanese Feel Friendly Toward China*, DAILY YOMIURI (Tokyo), Dec. 25, 2005, available at LEXIS.

¹⁴⁶ *See Joseph Kahn, China General Threatens Use of A-Bombs if U.S. Intrudes*, N.Y. TIMES, July 15, 2005 at A8 (describing a Chinese general's threat to use nuclear weapons against the United States if its military intervenes in a conflict over Taiwan, an ally of the United States and Japan).

governor alleging the Chinese government “holds no value at all for human life.”¹⁴⁷ In this hostile environment, any changes to Japan’s pacifist constitution will provoke a “high degree of concern” from China.¹⁴⁸

ii. Korea

In Korea, there are “negative feelings”¹⁴⁹ and lingering distrust of Japan over its acknowledgment of war responsibility and its treatment of Korea during its colonial occupation.¹⁵⁰ Japan is also in a dispute with South Korea for legal title over the small island of Dokdo (or Takeshima in Japanese).¹⁵¹ While Japan annexed the island in 1905 along with Korea, South Korea appears to have greater historical claim of ownership, and currently has possession.¹⁵² Japan has eased matters somewhat and shown goodwill by returning a 300-year-old Korean war monument that had been confiscated by Japan in 1905.¹⁵³

¹⁴⁷ Ishihara: *Life-Respecting U.S. No Match in War Against China*, ASAHI (Tokyo), Nov. 5, 2005, available at Factiva.

¹⁴⁸ *Japan Should Wake Up to History*, *supra* note 52.

¹⁴⁹ Kentaro Kurihara, *Ban: Negative Feelings Linger Over Yasukuni, History Issues*, ASAHI (Tokyo), Nov. 11, 2005, available at http://www.alpha-la.org/link.asp?TOPIC_ID=225 (quoting Ban Ki Moon, South Korea’s Foreign Affairs and Trade Minister in his meeting with former Japanese Foreign Minister Taro Aso). Aso also described political relations between the two countries as “very grave[.]” *South Korean Foreign Minister Says Relations with Japan in ‘Very Grave’ Situation*, MAINICHI DAILY (Tokyo), Nov. 21, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹⁵⁰ In what is almost certainly a thinly veiled political attack, South Korea has recently demanded data regarding an estimated 10,000 Koreans who were forced from the former colony to work in Japan specifically for the mining company previously owned by the father of former Japanese Foreign Minister Taro Aso. See H. Ichikawa & T. Takatsuki, *Seoul Seeks Prewar Conscription Data of Aso Company*, ASIAVIEWS, Nov. 30, 2005, <http://www.asiaviews.org/?content=fddfdfe332wxy40&report=20051130203913>.

¹⁵¹ See Hyung K. Lee, *Mapping the Law of Legalizing Maps: The Implications of the Emerging Rule on Map Evidence in International Law*, 14 PAC. RIM L. & POL’Y J. 159, 186-87 (2005).

¹⁵² See *id.* In 2006 Japan again angered South Korea with its plans for a Coast Guard survey of the islands. See Mari Yamaguchi, *Japan, South Korea Work to Defuse Dispute*, ASSOCIATED PRESS, Apr. 19, 2006, available at Factiva.

¹⁵³ See *Japan to Return Looted Stone Monument*, CHOSUNILBO, Oct. 11, 2005, available at <http://english.chosun.com/w21data/html/news/200510/200510110019.html>.

Relations are certainly no better between Japan and North Korea. In 1998, North Korea sent a long-range test missile over Japan,¹⁵⁴ proving its capability to strike Japan with a nuclear warhead in approximately ten minutes.¹⁵⁵ While negotiations have shown some promise,¹⁵⁶ details regarding North Korea's agreement to "abandon its nuclear weapons program and dismantle weapons" have yet to materialize.¹⁵⁷ In the meantime, repercussions from North Korea's 2002 admission to kidnapping thirteen Japanese citizens are still being felt.¹⁵⁸ While five of the citizens returned, North Korea claims that the other eight have since died.¹⁵⁹ Japan now demands evidence to support this assertion.¹⁶⁰ To make matters worse, in October of 2006, North Korea conducted its first nuclear test.¹⁶¹ This event will likely dramatically increase already existing tensions in the region.¹⁶²

iii. Russia

While Russia does not have the same complaints about the

The monument, *Bukgwandaechupbi*, had most unhelpfully been displayed by Japan at the Yasukuni war shrine in Tokyo. *See id.* The fate of *Bukgwandaechupbi* is still up in the air however, since Japan is returning it to South Korea, while it was originally taken from what is now North Korea. *See id.*

¹⁵⁴ *See New East Asia, Old Enmities*, ECONOMIST, Oct. 8-14, 2005, at 14.

¹⁵⁵ *See* Takashi Imae, *Japan-U.S. Defense Ties Boosted*, DAILY YOMIURI (Tokyo), Oct. 31, 2005, available at 2005 WLNR 17599430. In 2006, North Korea sent an additional seven test missiles, this time landing in the Sea of Japan. *See* Norimitsu Onishi, *North Korea Flatly Rejects Protests on Missile Firings*, N.Y. TIMES, July 7, 2006, at A12.

¹⁵⁶ *See* Cameron McLauchlan, *DPRK Won't Set Conditions on 6-Way Talks*, DAILY YOMIURI (Tokyo), Oct. 22, 2005, available at LEXIS.

¹⁵⁷ *Rice Warns N. Korea on New Nuclear Demands*, ASSOCIATED PRESS, Oct. 24, 2005, available at Factiva; *see also* Editorial, *Disappointment in Beijing*, JAPAN TIMES (Tokyo), Nov. 17, 2005 available at <http://search.japantimes.co.jp/cgi-bin/ed20051117a1.html> (discussing the lack of satisfactory momentum in the continuing North Korean nuclear talks) (registration required to access the article).

¹⁵⁸ *See Japan, N. Korea to Hold Talks Next Week*, ASSOCIATED PRESS, Oct. 26, 2005, available at Factiva.

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

¹⁶¹ Martin Fackler, *Japan Now Seems Likely to Rally Behind New Prime Minister's Call for a Stronger Military*, N.Y. TIMES, Oct. 10, 2006, at A8.

¹⁶² *See id.*

legacy of Imperial Japan as China and Korea, there are lingering disputes between the two countries that undermine ideal diplomatic relations. Primary amongst these is a territorial dispute over a group of four small islands north of Hokkaido and south of Kamchatka known as the Kuril Islands.¹⁶³ In fact, the dispute over the islands, which have been under Russian control since it invaded Japan in 1945,¹⁶⁴ is treated so seriously that it has prevented the two countries from signing a formal peace treaty since WWII.¹⁶⁵ It is quite possible that this issue will prevent Japan from convincing Russia to route a new and much desired oil pipeline through the Pacific rather than through China, with whom Russia has stronger ties.¹⁶⁶

II. History of Article 9

To examine the possibility of revision to the Japanese Constitution, it is important to first understand how the current constitution was created. Japan's Constitution did not always have an express war renunciation clause. In fact, until the Meiji Restoration that began in 1868, Japan was a feudal state, with factions representing the emperor and the powerful samurai shogunate engaging in frequent battles.¹⁶⁷ Beginning in 1868, however, the forces of the emperor began to consolidate power

¹⁶³ For a detailed history of this dispute, see Amy B. Quillen, *The "Kuril Islands" or the "Northern Territories": Who Owns Them? Island Territorial Dispute Continues to Hinder Relations Between Russia and Japan*, 18 N.C. J. INT'L L. & COM. REG. 633 (1993).

¹⁶⁴ *Id.* at 637.

¹⁶⁵ *Id.* at 633. As evidence of how seriously the matter is treated, in August of 2006, the Russian Border Coast Guard fired on a Japanese fishing vessel which had strayed outside of the authorized fishing area, killing one fisherman. *Russian Fire Kills Fisherman/Crew Member of Japanese Boat Shot Off North Territories*, DAILY YOMIURI (Tokyo), Aug. 17, 2006, available at LEXIS.

¹⁶⁶ See *N. Isles, Pipeline Issues May Bedevil Putin's Visit*, DAILY YOMIURI (Tokyo), Oct. 24, 2005, available at LEXIS. Joint economic development of the islands is still a possibility. See *Putin to Present Northern Territories Proposal at Japan-Russia Talks*, MAINICHI DAILY (Tokyo), Nov. 15, 2005, available at LEXIS. In the meantime, Russia has apparently sought to strengthen its position by building a church on one of the virtually uninhabited islands. See *Russia Erects 'Church' on Suisho Island*, DAILY YOMIURI (Tokyo), Nov. 18, 2005, available at LEXIS.

¹⁶⁷ See Hamano, *supra* note 3, at 421; *'Miracle' Reforms Now the LDP's Main Mission*, ASAHI (Tokyo), Nov. 23, 2005, available at LexisNexis Academic.

and the world witnessed “the emergence of the modern state”¹⁶⁸ of Japan out of three centuries of international isolation.¹⁶⁹

The first constitution of Japan, the Meiji Constitution, appeared in 1889,¹⁷⁰ but it did not establish the principle of pacifism. Rather, the emperor was given the express power to “declare[] war, make[] peace, and conclude[] treaties.”¹⁷¹ Furthermore, the Meiji Constitution clearly dictated the absolute nature of the emperor’s power in seventeen articles.¹⁷² The emperor was seen to have come from “a line of Emperors unbroken for ages eternal”¹⁷³ as a “sacred *arahitogami*”¹⁷⁴ or “god who appears in human form.”¹⁷⁵ The absolute control of the emperor was finally relinquished on September 2, 1945, when Japan surrendered to the Allied Powers in Tokyo Bay.¹⁷⁶

The United States’ occupation of Japan spanned seven years, from 1945 to 1952, following the end of WWII.¹⁷⁷ Starting October 4, 1945, the United States began demanding a revised constitution for Japan.¹⁷⁸ “[T]he Supreme Commander of the Allied Powers (SCAP), General Douglas MacArthur, directed [the inclusion of] . . . a provision banning a Japanese army, navy, or air force for any purpose, including preserving Japanese security.”¹⁷⁹

¹⁶⁸ Hamano, *supra* note 3, at 418.

¹⁶⁹ ‘Miracle’ Reforms Now the LDP’s Main Mission, *supra* note 167.

¹⁷⁰ Hamano, *supra* note 3, at 424.

¹⁷¹ MEIJI KENPŌ, art. 13.

¹⁷² MEIJI KENPŌ, arts. 1-17.

¹⁷³ MEIJI KENPŌ, art. 1. “Japan’s Chrysanthemum Throne claims to have the oldest line of succession of any monarchy, with the first legendary emperor ascending to the title 660BC.” David Fickling, *Japanese Panel Backs Female Emperors*, GUARDIAN (London), Nov. 21, 2005, available at <http://www.guardian.co.uk/japan/story/0,7369,1647565,00.html>.

¹⁷⁴ MEIJI KENPŌ, art. 3.

¹⁷⁵ HOOK & MCCORMACK, *supra* note 5, at 5.

¹⁷⁶ “The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers.” Instrument of Surrender by Japan, Sept. 2, 1945, 59 Stat. 1733, 1734. “[O]n New Year’s Day 1946 [the Emperor] renounced all claims to being divine.” HOOK & MCCORMACK, *supra* note 5, at 5.

¹⁷⁷ Port, *supra* note 13, at 140.

¹⁷⁸ See Auer, *supra* note 4, at 172.

¹⁷⁹ *Id.* at 171.

Following dissatisfaction with the first draft, which expressly retained armed forces, MacArthur presented his own draft to Japan.¹⁸⁰

A. *Original Intent*

The American draft first presented the idea of complete war renunciation.¹⁸¹ Curiously, there is some dispute as to whether the concept originated on the American or Japanese side.¹⁸² While MacArthur recalled that former Prime Minister Shidehara first mentioned it, "Yoshida, Shidehara's Foreign Minister and later prime minister, stated his belief that MacArthur suggested the idea to Shidehara and Shidehara agreed."¹⁸³ Subsequent research, however, has supported MacArthur's position that indeed "[t]he idea was first suggested by . . . Shidehara."¹⁸⁴ In making his point to MacArthur, Shidehara opined that "in the atomic age, the survival of mankind should precede all national strategies; . . . other nations must follow the same principle of renouncing war if they themselves [are] to survive."¹⁸⁵

When the American draft was submitted, MacArthur made it clear that the war renunciation clause disarming Japan made no exceptions, "even for preserving its own security."¹⁸⁶ Yoshida, then acting as Prime Minister, concurred with this view, stating that Japan was "not allowed . . . armament" even for maintaining

¹⁸⁰ See *id.* at 173. Interestingly, SCAP also pressured Japan to include advanced human rights provisions that went even further than the American Constitution. See Hamano, *supra* note 3, at 430-39. For example, this includes the right to "[a]cademic freedom." KENPŌ, art. 23. Perhaps the most interesting provision in this regard is the Japanese Constitution's allocation of the positive duty that "[t]he freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people." KENPŌ, art. 12.

¹⁸¹ See Auer, *supra* note 4, at 173.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Kenzo Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, 71, 79 (Dan Fenno Henderson ed., 1968).

¹⁸⁵ *Id.* at 86.

¹⁸⁶ Auer, *supra* note 4, at 173 (quoting O. NISHI, THE CONSTITUTION AND THE NATIONAL DEFENSE LAW SYSTEM IN JAPAN (1987)). MacArthur later contradicted himself saying that the renunciation clause did not rule out the right to self-defense. *Id.* at 174.

security.¹⁸⁷ While the original intent of both sides may now be clear, this absolutist view did not last long.

By the summer of 1946, the “so-called Ashida amendment” served to obfuscate the clarity of the unconditional disarmament originally intended even before the constitution was finalized.¹⁸⁸ First, the amendment added the phrase “aspiring sincerely to an international peace based on justice and order” to the first section of Article 9.¹⁸⁹ “Second, the words ‘[i]n order to accomplish the aim of the preceding paragraph’ were added to the beginning of the second sentence.”¹⁹⁰ Some argue that by clarifying that the renunciation of arms is for the purpose of aspiring to international peace, the disarmament was not intended to be absolute, but rather “specifically designed to allow rearmament for the purpose of self-defense.”¹⁹¹ Nevertheless, the explanation given to Japanese students immediately after the promulgation of the new constitution was that, while Japan had the right to self-defense according to international law, it had voluntarily restrained itself in this regard “by virtue of the second paragraph” of Article 9.¹⁹²

B. Rise of the SDF

It did not take long, however, for the newer, less absolute view of Article 9 to be used to argue for the constitutionality of national self-defense. While the chief goal of the occupation had been the complete disarmament of Japan,¹⁹³ the United States had reason to regret it by the onset of the Korean War by 1950.¹⁹⁴ When North Korea invaded South Korea with a force of 135,000 men, the only

¹⁸⁷ Edward J.L. Southgate, *From Japan to Afghanistan: The U.S.-Japan Joint Security Relationship, The War on Terror, and the Ignominious End of the Pacifist State?*, 151 U. PA. L. REV. 1599, 1609 (2003) (emphasis omitted).

¹⁸⁸ Derek Van Hoften, *Declaring War on the Japanese Constitution: Japan's Right to Military Sovereignty and the United States' Right to Military Presence in Japan*, 26 HASTINGS INT'L & COMP. L. REV. 289, 293-94 (2003).

¹⁸⁹ Auer, *supra* note 4, at 175.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 176.

¹⁹³ Port, *supra* note 13, at 140.

¹⁹⁴ See Southgate, *supra* note 187, at 1612. The Korean War began only “a few weeks after the third birthday of Article 9.” Maki, *supra* note 50, at 74.

sufficient force the United States had in the region was stationed in Japan as the occupying army.¹⁹⁵ As a result, MacArthur redeployed that division, leaving “a void in Japan.”¹⁹⁶ On July 8, 1950, in response to this newly created void, MacArthur requested that Yoshida “form a 75,000-man National Police Reserve (NPR).”¹⁹⁷

One of the unique characteristics of the NPR was that personnel and vehicles were carefully given names to avoid comparison with a real army.¹⁹⁸ For example, tanks were called “special vehicles” and former colonels and soldiers were now called “reserve policemen.”¹⁹⁹ This reflects the apprehension of the administration at the time that the NPR could be construed as a violation of the constitution. Prime Minister Yoshida stated in 1952 that “‘to maintain war potential, even for the purpose of self-defense, would mean rearmament [and] would necessitate revision of the Constitution.’”²⁰⁰

Yoshida’s position quickly changed that very year, as he took charge of the self-defense force, now re-named the National Safety Forces (NSF).²⁰¹ In this new capacity, Yoshida now maintained that “war potential . . . could be differentiated from ‘defense potential’ and that the NSF were not unconstitutional because they had no capability to wage modern warfare.”²⁰² This change of heart was well-timed, considering the 1951 U.S.-Japan Security Treaty, which, in addition to allowing United States armed forces to be stationed in Japan, came with the “expectation . . . that Japan will itself increasingly assume responsibility for its own defense.”²⁰³

By 1954, the NSF had morphed into the Self-Defense Forces (SDF) and with this change came a more direct statement from the

¹⁹⁵ See Port, *supra* note 13, at 140-41.

¹⁹⁶ *Id.* at 141.

¹⁹⁷ Auer, *supra* note 4, at 176.

¹⁹⁸ See *id.* at 177.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *id.*

²⁰² *Id.*

²⁰³ Security Treaty Between the United States of America and Japan, U.S.-Japan, Sept. 8, 1951, 3 U.S.T. 3329.

government—"the case of military power as a means of defending the nation when the nation has been attacked by military power is not counter to the Constitution."²⁰⁴ The scope of the SDF had also grown significantly in comparison to the NPR, with the force now possessing ground, maritime, and air force components.²⁰⁵ By 1959, former Prime Minister Nobusuke Kishi and his Cabinet announced "there is nothing to prevent the maintaining of the minimum amount of nuclear weapons for self-defense" and "counter attacks on enemy bases are within the scope of self-defense."²⁰⁶

Nineteen Sixty heralded a revision to the 1951 treaty in the form of the U.S.-Japan Treaty of Mutual Cooperation and Security,²⁰⁷ accompanied by domestic protests feverish enough to "bring down" the administration.²⁰⁸ While the next thirty-seven years were relatively uneventful in terms of official developments, the SDF quietly continued to increase in size.²⁰⁹ In order to "ease fears that the SDF would grow too large," Japan committed to limit defense expenditures to no more than 1 percent of the Gross National Product (GNP) in 1976.²¹⁰ This was made quite easy considering the "phenomenal double digit growth of the GNP rate in the 1960[s]."²¹¹ By the 1980s, however, economic "slowdown" made this goal difficult to reach²¹² and it was finally abandoned in

²⁰⁴ Auer, *supra* note 4, at 178 (citing K. MASUHARA, *NIHON NO BOEI [JAPAN'S DEFENSE]* 57, 58 (1961)).

²⁰⁵ *See id.*

²⁰⁶ *Id.* at 178-79 (citing MASUHARA, *supra* note 204, at 59). This sentiment has been confirmed by Abe's current administration; LDP Policy Research Council Chairman Shoichi Nakagawa indicated that "[t]he government interprets the Constitution as allowing Japan to possess nuclear weapons as part of its minimum necessary requirements to defend itself." *Top LDP Policymaker Says Possession of Nuclear Arms Permitted Under Constitution*, MAINICHI DAILY (Tokyo), Oct. 31, 2006, available at LEXIS. Following North Korea's nuclear test in 2006, there has even been some discussion of nuclear weapon possession in the Abe cabinet. *See Hawks Circling as Constitution Turns 60*, JAPAN TIMES (Tokyo), available at <http://search.japantimes.co.jp/cgi-bin/nn20061107f1.html> (registration required to access the article).

²⁰⁷ *Id.* at 179.

²⁰⁸ Southgate, *supra* note 187, at 1615.

²⁰⁹ *See* Auer, *supra* note 4, at 180.

²¹⁰ *Id.*

²¹¹ *Id.* at 180 n.39.

²¹² *Id.* at 180.

1987, to be replaced by a "new nonquantitative limit."²¹³

In the 1997 Guidelines for U.S.-Japan Defense Cooperation, the United States and Japan once again updated their security relationship, and once again expanded Japan's role in its own security.²¹⁴ While the Guidelines provide the qualification that Japan should "conduct all of its actions within the limits of its Constitution,"²¹⁵ there is no accompanying clarification as to how the new requirements will allow the SDF to remain within the constraints of Article 9. For example, in addition to now having "primary responsibility" for its own defense,²¹⁶ Japan now has extended security responsibilities into the somewhat nebulous "areas surrounding Japan."²¹⁷

In this new role, Japan must defend "surrounding waters and . . . sea lines of communication[.]"²¹⁸ The range of this responsibility is not defined geographically, but rather is said to be "situational," presumably to be defined by the parameters of a potential threat.²¹⁹ The range of situations which qualify for Japanese military action include those that "will have an important influence on Japan's peace and security."²²⁰ One commentator understands this vague language to at least include conflicts between North and South Korea or China and Taiwan, and notes the anxiety this will likely cause Japan's closest neighbors.²²¹

Perhaps the aspect of the Guidelines that most directly challenges Article 9 is the requirement that Japan provide "rear area support" for the United States military operations related to the treaty "on the high seas and international airspace around Japan"²²² If taken literally, Japan could be required to

²¹³ *Id.* at 180-81.

²¹⁴ Hoften, *supra* note 188, at 299.

²¹⁵ Japan-United States: Joint Statement on Review of Defense Cooperation Guidelines and Defense Cooperation Guidelines, U.S.-Japan, art. 2 ¶ 2, Sept. 23, 1997, 36 I.L.M. 1621, 1625 [hereinafter Guidelines].

²¹⁶ *Id.* art. 4 ¶ 2(1)(a).

²¹⁷ *Id.* art. 4 ¶ 1.

²¹⁸ *Id.* art. 4 ¶ 2(2)(b).

²¹⁹ *Id.* art. 5.

²²⁰ *Id.*

²²¹ Southgate, *supra* note 187, at 1617.

²²² Guidelines, *supra* note 215, art. 5 ¶2(2)(b).

conduct military activities and provide support in areas unquestionably beyond Japan's national borders. As one commentator noted, even if a "revisionist" interpretation of Article 9 is taken for granted, it is difficult to distinguish between self-defense and war potential when dealing with military support for another country's armed forces beyond the borders of Japan.²²³ To a certain extent, Japan felt it was acting in self-defense, or at least "in order to survive," when it attacked Pearl Harbor as a response to an American scrap metal and fuel embargo against Japan.²²⁴ It was likely then that when Article 9 was originally discussed in the Japanese legislature, there was a fear that "if the Constitution allows a defensive war, such prohibition can easily be evaded . . . [leading to] a risk that Japan might start a war under the name of self-defense."²²⁵

Japan's definition of self-defense was further broadened after the attacks on the United States on September 11, 2001.²²⁶ On October 29, 2001, the Japanese legislature approved the Anti-Terrorism Special Measures Law, which goes beyond the constraints of the 1997 Guidelines by allowing Japan to support United States military activities in the actual "territory of foreign countries"²²⁷ While such Japanese operations are to be conducted "in areas where combat is not taking place,"²²⁸ Japanese forces are authorized to return fire "when an unavoidable and reasonable cause exists for use of weapons to protect lives and bodies of themselves . . . or those who are with them"²²⁹ As one commentator notes, arguing that "support of a 'war' on terrorism is 'defensive' is tantamount to claiming that the best defense is a good offense."²³⁰

²²³ Southgate, *supra* note 187, at 1619.

²²⁴ See Port, *supra* note 13, at 135.

²²⁵ *Id.* at 143.

²²⁶ See Southgate, *supra* note 187, at 1619.

²²⁷ *Id.* at 1620.

²²⁸ *Id.* at 1621.

²²⁹ *Id.* at 1620.

²³⁰ *Id.* at 1622. Despite such constitutional concerns, support for the Anti-Terrorism law in the legislature remains strong. See *Lower House Passes Extension of Anti-Terrorism Law*, ASAHI (Tokyo), Oct. 18, 2005, available at Factiva. The chief activity under the law has been the maintenance of what amounts to a free filling station in the

C. *The SDF Today*

There are many geographic, political, and social, factors that would seem to naturally limit the necessity of a large Japanese military force. The surrounding waters of the islands work as “a defensive moat” creating a situation where any invader must have “the will to suffer the losses that even a limited defense could inflict.”²³¹ In addition, Japan lacks natural resources, a factor which once motivated Japan’s own aggressions.²³² In any event, the resources Japan possesses today that might interest a potential invader, industry and technology, would be destroyed in an attempt to gain them.²³³ Finally, though the affected generations are disappearing, there is a “deep scar left on the national psyche by the tragedy of the lost war with its suffering, death, and devastation.”²³⁴

Still, popular support for the SDF,²³⁵ continuing pressure from the United States to assume more responsibility in cooperative military defense,²³⁶ and the threat of some of the largest military powers in the world as neighbors have spurred the SDF into what it is today—a formidable force even by international standards. “Japan currently spends roughly the same amount as Britain on its

Indian Ocean for the navies of friendly forces. See Editorial, *Extending the SDF Missions*, JAPAN TIMES (Tokyo), Sept. 30, 2005, available at Factiva. The latest interim report on Japanese and American security cooperation further expands the role of the SDF, in part by reducing the overall number of American troops stationed in Japan, moving roughly 7,000 marines from Okinawa to other areas including Guam. U.S.-Japan Alliance: Transformation and Realignment for the Future, U.S.-Japan, art. 3 ¶ 2, Oct. 29, 2005, available at <http://www.state.gov/documents/organization/55886.pdf>. The report also discusses the bi-lateral responsibilities of Japan and the United States in their “[e]fforts to improve the international security environment, such as participation in international peace cooperation activities.” *Id.* art. 2 ¶ 1.

²³¹ Maki, *supra* note 50, at 75.

²³² *Id.* at 76.

²³³ *Id.*

²³⁴ *Id.* at 77.

²³⁵ *Id.*

²³⁶ See *id.* at 76. After previous comments criticizing Japan’s unwillingness to send international military support, former United States Deputy Secretary of State Richard Armitage suggested in 2004 that Article 9 and the Japanese Constitution’s prohibition of a military “imped[ed] the Japan-U.S. alliance.” Weston S. Konishi, Opinion, *Time to Take a Hard Look at Article 9*, DAILY YOMIURI (Tokyo), July 28, 2004, available at LEXIS.

military, an amount which places the country third in the world behind only the United States and Russia.”²³⁷ In addition to having a force of more than 240,000,²³⁸ Japan also has over 1100 tanks and approximately fifty destroyers, fifteen submarines, and 475 combat aircraft.²³⁹ “Japan spends more money defending its territory per square mile than any other country in the world, except the United Kingdom.”²⁴⁰ “[A]s of 2001, ten of the top 100 arms producing corporations were Japanese companies.”²⁴¹

The SDF also continues to grow in terms of cutting edge military technology. Currently, Japan and the United States are jointly developing a Pacific missile defense program with an estimated price tag of around three billion dollars, including Patriot Advanced Capability 3 missiles designed to “intercept and destroy incoming ballistic and cruise missiles.”²⁴² Japan is also currently developing a state-of-the-art “secret intelligence service along the lines of Britain’s MI6 to conduct overseas espionage.”²⁴³ These efforts will include gathering information about North Korea and its other neighbors using high altitude unmanned aerial vehicles, and sharing such information with the United States.²⁴⁴ One commentator has even predicted that Japan will soon possess offensive nuclear capabilities.²⁴⁵

²³⁷ Hoften, *supra* note 188, at 296.

²³⁸ Freire, *supra* note 2.

²³⁹ *Id.*

²⁴⁰ Port, *supra* note 13, at 148.

²⁴¹ *Id.* at 150.

²⁴² *ASDF Batteries to Get Advanced Missiles by 2010*, JAPAN TIMES (Tokyo), Oct. 10, 2005, available at <http://search.japantimes.co.jp/member/member.html?mode=makeprfy&file=nn20051010a2.html> (registration required to access the article).

²⁴³ Tsukasa Arita, *James Bond Goes Japanese? Tokyo Eyes MI6-Style Spy Agency*, JAPAN TIMES (Tokyo), Oct. 21, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051021f2.html> (registration required to access the article).

²⁴⁴ *Interim Report Stresses Defense Cooperation Between Japan, U.S.*, ASAHI (Tokyo), Oct. 28, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation).

²⁴⁵ See Robyn Lim, Editorial, *Toward a Nuclear Japan?*, JAPAN TIMES (Tokyo), Sept. 29, 2005, available at <http://search.japantimes.co.jp/cgi-bin/ea20050929rl.html> (registration required to access the article). Some nations already “may view Japan with suspicion” regarding its continuing nuclear power projects. Editorial, *Nuclear Program Raises Issues*, JAPAN TIMES (Tokyo), Oct. 14, 2005, available at <http://search.japantimes.co.jp/print/ed20051014a1.html> (registration required to access the article).

The SDF is now more active internationally than ever before. In addition to a 1992 peacekeeping mission in Cambodia and logistical support for the UN in the Golan Heights,²⁴⁶ the SDF has recently engaged in several large-scale operations in the Middle East. In support of "U.S.-led troops in Afghanistan," Japan has and will continue to provide fuel for "coalition warships in the Indian Ocean" until at least late 2006.²⁴⁷ "Japan . . . also stationed 600 non-combat troops in the . . . city of Samawah on . . . [a] humanitarian mission to purify water, rebuild schools, and other tasks" as part of United States-led efforts in Iraq.²⁴⁸ And, despite arguments to the contrary,²⁴⁹ Japan did not decide to pull its troops out of Iraq until June 2006.²⁵⁰ Furthermore, the SDF has also recently engaged in humanitarian aid for the tsunami victims in Indonesia and earthquake victims in Pakistan.²⁵¹ The Japanese Coast Guard has even been in cooperation with India to help fight piracy on the high seas.²⁵²

III. Constitutionality of the SDF under Article 9

The Constitution of Japan declares itself to be "the supreme

However, currently Japan has not stepped down from its 1967 policy of "three non-nuclear principles, whereby Japan pledge[s] not to possess or manufacture nuclear weapons, and not to allow nuclear weapons to be brought into Japan." Auer, *supra* note 4, at 178.

²⁴⁶ Port, *supra* note 13, at 132.

²⁴⁷ *Japan to Extend Afghan Anti-Terror Mission*, ASSOCIATED PRESS, Oct. 18, 2005, available at Factiva. Some in Japan criticize the country for providing what amounts to a "free gasoline station." *Id.*

²⁴⁸ *Id.*

²⁴⁹ See *Govt May Pull GSDF Out of Iraq in '06 1st Half*, DAILY YOMIURI (Tokyo), Sept. 29, 2005, available at 2005 WLNR 15359346.

²⁵⁰ See Norimitsu Onishi, *Japan to Pull Its Ground Troops Out of Iraq*, N.Y. TIMES, June 21, 2006 at A8.

²⁵¹ See *Japan to Dispatch Transport Helicopters, GSDF Members to Quake-Hit Pakistan*, ASAHI (Tokyo), Oct. 11, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation). Similarly, Japan dispatched troops to aid quake-ridden Indonesia in 2006. *SDF Team Opens Clinic in Quake-Hit Java Town*, JAPAN TIMES (Tokyo), June 4, 2006, available at <http://search.japantimes.co.jp/print/nn20060604a4.html> (registration required to access the article).

²⁵² See *Japanese, Indian Coast Guards Agree to Closer Cooperation Against Terrorism, Pirates*, ASSOCIATED PRESS, Nov. 16, 2005, available at Factiva.

law of the nation.”²⁵³ The apparent disconnect between the constitutional revocation of war and military and the relatively boundless growth of the SDF has not gone unnoticed. In addition to extensive protests of the SDF and security arrangements with the United States, most prominently in 1960,²⁵⁴ the Japanese judicial system heard cases which attempted to have the SDF found unconstitutional under Article 9. Despite having the “power to determine the constitutionality of any law, order, regulation, or official act,”²⁵⁵ the courts have thus far refused to rule against the SDF.²⁵⁶

A. Judicial “Response”

The likelihood that a Japanese high court would find the SDF unconstitutional is very low, given that “the Japanese Supreme Court has pursued a policy of extreme deference to the legislature in exercising judicial review.”²⁵⁷ In fact, the Japanese Supreme Court “has only found laws to be unconstitutional six times.”²⁵⁸ Even where a law is found unconstitutional, the Court will at times “offer no remedy other than[] to seek redress from the legislature.”²⁵⁹ Nevertheless, these circumstances have not prevented attempts to challenge the constitutionality of the SDF.

²⁵³ KENPŌ, art. 98.

²⁵⁴ See Southgate, *supra* note 187, at 1615.

²⁵⁵ KENPŌ, art. 81.

²⁵⁶ See *Sakata v. Japan* (The Sunakawa Case), 13 Keishū 3225 (Sup. Ct., Dec. 16, 1959), reprinted in *COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60* 298 (John M. Maki ed., 1964); *Ito et al. v. Minister of Agriculture, Forestry, and Fisheries* (The Naganuma Missile Site Case, I), 712 HANREI JIHŌ 24 (Sapporo D. Ct., Sept. 7, 1973), reprinted in *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* (Lawrence W. Beer & Hiroshi Itoh eds., 1996); *Minister of Agriculture, Forestry, and Fisheries v. Ito et al* (The Naganuma Nike Missile Site Case, II), 27 GYŌSAI REISHŪ 8 (Sapporo High Ct., Aug. 5, 1976), reprinted in *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*; *Uno et al v. Minister of Agriculture, Forestry, and Fisheries* (The Naganuma Nike Missile Site Case, III), 36 MINSHŪ 9 (Sup. Ct., Sept. 9, 1982), reprinted in *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*; *Ishizuka et al v. Japan et al* (The Hyakuri Air Base Case), 43 Minshū 6 (Sup. Ct., June 20, 1989), reprinted in *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*.

²⁵⁷ Southgate, *supra* note 187, at 1624.

²⁵⁸ Hamano, *supra* note 3, at 459.

²⁵⁹ *Id.* at 462-63.

The most celebrated of these cases is known as The Sunakawa Case.²⁶⁰ While the case technically did not directly address the SDF itself, many have used it to argue for the constitutionality of the fighting force.²⁶¹ As a defense to the destruction of fences and interference with a property survey at a United States military base in Japan, local protester defendants challenged the constitutionality of the security treaty between the United States and Japan.²⁶² Reversing a lower court acquittal, the Supreme Court sidestepped the constitutionality of the treaty, stating that due to the "highly political nature [of the treaty,] . . . the legal decision as to unconstitutionality has a character which . . . is not adaptable to review by a judicial court . . . [and] must be entrusted to the decision of the . . ." executive and legislative branches.²⁶³ In very important dicta the court clearly stated that Article 9 "in no way denies the inherent right of self-defense, which our country possesses as a sovereign nation."²⁶⁴ Rather, the "war potential [that is] forever renounced . . . is the resort to what is called aggressive war."²⁶⁵

In the late 1960s and early 1970s, Japan began reclassifying part of the forest reserves of the northern island of Hokkaido in order to develop an anti-aircraft missile base for the SDF.²⁶⁶ In a series of cases known as the Naganuma Nike cases, protesters directly challenged the constitutionality of the SDF.²⁶⁷ At first, the protesters were successful in the Sapporo District Court.²⁶⁸ In an attempt to avoid directly contradicting the Supreme Court's decision in the Sunakawa Case, the District Court maintained that Japan does indeed possess a right to self-defense, but added that

²⁶⁰ Sakata, *reprinted in* COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, *supra* note 256, at 298.

²⁶¹ Fisher, *supra* note 20, at 410.

²⁶² See Southgate, *supra* note 187, at 1625.

²⁶³ Sakata, *reprinted in* COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, *supra* note 256, at 305-06.

²⁶⁴ *Id.* at 303.

²⁶⁵ *Id.* at 304.

²⁶⁶ Southgate, *supra* note 187, at 1626.

²⁶⁷ *Id.*

²⁶⁸ See Ito et al. v. Minister of Agriculture, Forestry, and Fisheries, *reprinted in* THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, *supra* note 256, at 83.

this is "related to the social, economic, and political concerns of the country and to international concerns such as its international position and its diplomacy."²⁶⁹ Thus, Article 9 does not allow an advanced military force but only "reliance on peaceful diplomacy to avoid aggression; use of the police force, which is mainly for internal security; . . . mass uprisings in which the people take up arms and resist; confiscation of the property held by citizens of the aggressor country, or deportation of those individuals."²⁷⁰

This decision was "promptly reversed"²⁷¹ by the Sapporo High Court,²⁷² which held that if the SDF clearly had an aggressive nature, it would be unconstitutional.²⁷³ Since it found that the SDF was not "at first sight . . . clearly aggressive[,] . . . the problem . . . is a decision concerning state governance [and should] ultimately be entrusted to . . . political judgment."²⁷⁴ The decision was affirmed by the Supreme Court, which did not reach the constitutionality issue.²⁷⁵

The Supreme Court has continued to exercise constitutional avoidance when conflicts arise between the SDF and Article 9.²⁷⁶ Despite some willingness in lower courts to find government action unconstitutional,²⁷⁷ it remains highly unlikely that the Japanese Supreme Court will hold the SDF to be

²⁶⁹ *Id.* at 101.

²⁷⁰ *Id.* at 102.

²⁷¹ Southgate, *supra* note 187, at 1627.

²⁷² See Minister of Agriculture, Forestry, and Fisheries v. Ito et al, *reprinted in* THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, *supra* note 256, at 112 (holding that Article 9 does not reach private law matters, in response to a contractual dispute between local protesters attempting to buy land and refuse to sell it to the SDF for military development).

²⁷³ *Id.* at 121.

²⁷⁴ *Id.* at 122.

²⁷⁵ See Uno et al v. Minister of Agriculture, Forestry, and Fisheries, *reprinted in* THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, *supra* note 256, at 122.

²⁷⁶ See Ishizuka et al v. Japan et al (The Hyakuri Air Base Case), *reprinted in* THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, *supra* note 256, at 130-31.

²⁷⁷ See *Court Decision a Warning to Koizumi*, *supra* note 109 (reporting the Osaka High Court's ruling that Koizumi's visits, held to be in a public capacity, to the Yasukuni War Shrine were unconstitutional in light of a prohibition of religious activity by the government).

unconstitutional.²⁷⁸ If change occurs it will likely come from the political branches—the executive or legislature—which hold greater power.²⁷⁹

B. Executive & Legislative Interpretations of Article 9

Starting in 1953, the Japanese executive branch stated that Article 9 does not prohibit military power for self-defense.²⁸⁰ By 1965, former Prime Minister Ikeda backed away from any static limitations to the SDF, stating that such limits “are not to be determined conceptually or numerically, but . . . according to the national situation, world affairs, and the development of scientific techniques.”²⁸¹ The next prime minister, Sato, mirrored this sentiment, stating that since the conditions required for self-defense will also be changing, “it would be difficult to show where the limit is.”²⁸² In 1981, former Prime Minister Suzuki stated that the national policy for self-defense reached as far as one thousand miles in the air and surrounding seas.²⁸³ By 1994, former Prime Minister Murayama went so far as to explicitly declare the current SDF to be constitutional.²⁸⁴

Despite protests along the way, the executive branch has also benefited substantially from a policy of liberal interpretation of Article 9. For example, in exchange for ignoring enormous pressure from Japanese citizens to discontinue Japan’s role as a “silent partner” in the United State’s war in Vietnam, former Prime Minister Sato was able to gain the return of the island of Okinawa, “which had been held by the United States since WWII.”²⁸⁵ Additionally, in exchange for Japan’s continued

²⁷⁸ For an interesting exploration into the degree of political influence and control of the Japanese judiciary, see Hamano, *supra* note 3, at 452-59.

²⁷⁹ See Fisher, *supra* note 20, at 413. Regardless of whether the Japanese Supreme Court is deliberately avoiding the constitutionality of the SDF, “the practical effect is the continued existence of the SDF and unfettered power by the Cabinet and the Diet to determine defense policy.” *Id.*

²⁸⁰ Auer, *supra* note 4, at 178.

²⁸¹ *Id.* at 179-80.

²⁸² *Id.* at 180.

²⁸³ *Id.*

²⁸⁴ Fisher, *supra* note 20, at 415-16.

²⁸⁵ *Id.* at 416.

cooperation with the United States in security treaties, Japan enjoys the "extended deterrence [of] the U.S. 'nuclear umbrella.'"²⁸⁶

The Japanese legislature, known as the Diet, has also taken its part in the continued expansion of the SDF. The 2001 anti-terrorism law, which will likely be renewed for the foreseeable future,²⁸⁷ declared SDF action in Iraq to be constitutional.²⁸⁸ In 1992, the Diet passed the U.N. Peace-Keeping Operations Law, designed to minimize the situations where the SDF is required to use force.²⁸⁹ But as it stands now, it is "unlikely that the Diet will do more than nominally observe the strictures of Article 9."²⁹⁰

C. Legal Strategies for Finding the SDF Constitutional

Apart from the judicial policy of avoidance regarding Article 9,²⁹¹ there have been several legal theories that attempt to justify the SDF within the confines of the current Constitution of Japan.²⁹² Perhaps foremost amongst these is constitutional transformation.²⁹³ Under this theory, a nation's interpretation of a constitutional provision changes over time naturally—this is said to "explain how the Constitution has survived without amendments."²⁹⁴ Constitutional transformation occurs when a constitutional provision has lost its effectiveness but has been replaced by a new meaning.²⁹⁵ While it can certainly be argued that Article 9 has lost its effectiveness, it is not clear that the original intent has been wholly replaced by a new meaning.²⁹⁶ If indeed popular opinion

²⁸⁶ Lim, *supra* note 245.

²⁸⁷ See *Lower House Passes Extension of Anti-Terrorism Law*, *supra* note 230.

²⁸⁸ See Southgate, *supra* note 187, at 1620.

²⁸⁹ See *id.* at 1631-32.

²⁹⁰ *Id.* at 1633.

²⁹¹ "The Supreme Court has yet to address the constitutionality of the SDF." Fisher, *supra* note 20, at 413.

²⁹² That is to say, such theories could allow one to avoid the conclusion that Japan no longer follows the rule of law. See Port, *supra* note 13, at 150.

²⁹³ *Id.* at 150. This theory has been described as "the key to Japan's ability . . . to assimilate an alien constitutional system with such equanimity." *Id.* at 151.

²⁹⁴ Fisher, *supra* note 20, at 414.

²⁹⁵ *Id.*

²⁹⁶ See *id.*

has fully endorsed the meaning argued by the executive, then why does the Supreme Court refuse to "deliver a direct opinion recognizing the constitutionality of the SDF"?²⁹⁷ As Japan scholar Kenneth Port points out, even if constitutional transformation is truly in effect, this still does not satisfy an inquiry into whether or not Japan follows the rule of law.²⁹⁸

The supremacy of international law is a different theory used to explain how the SDF can be considered constitutional. Although the Constitution of Japan declares itself the supreme law of the land,²⁹⁹ it also explicitly states that "treaties concluded by Japan and established laws of nations shall be faithfully observed."³⁰⁰ Professor Port argues that "the Constitution appears to make itself subject to international law."³⁰¹ One treaty to which Japan is a party is the United Nations Charter, which directly points to an inherent right of self-defense.³⁰² However, if Article 9 truly does deny Japan the right to self-defense, as was originally taught in Japanese schools after the war,³⁰³ the possible constitutional conflict between Article 9 and the self-defense recognized by the United Nations Charter has not yet been subject to judicial deliberation.³⁰⁴

The argument used most often by Japanese leaders to support the constitutionality of the SDF is a linguistic one based on the obfuscation of the Ashida amendments to Article 9.³⁰⁵ While

²⁹⁷ *Id.*

²⁹⁸ See Port, *supra* note 13, at 151.

²⁹⁹ KENPŌ, art. 98.

³⁰⁰ KENPŌ, art. 98 § 2.

³⁰¹ See Port, *supra* note 13, at 152.

³⁰² *Id.* at 151. The 1951 U.S.-Japan Security Treaty also implicitly recognizes Japan's right to self-defense, in that it recognizes Japan's increasing responsibility for its own defense, in addition to relying on the United States. See Security Treaty Between the United States of America and Japan, U.S.-Japan, Sept. 8, 1951, 3 U.S.T. 3329.

³⁰³ See Auer, *supra* note 4, at 176.

³⁰⁴ Some commentators, however, have argued that United Nations rules of force themselves are no longer in effect, given that two-thirds of the member nations have engaged armed conflicts since the founding of the organization. See Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 672-73 (2003).

³⁰⁵ For a more detailed analysis of subtle changes in the Japanese text which served to soften the impact of Article 9, see Port, *supra* note 13, at 152-57.

Article 9 states that “land, sea, and air forces, as well as other war potential, will never be maintained,” it does so only “[i]n order to accomplish the aim of the preceding paragraph.”³⁰⁶ The aim of the preceding paragraph is to “renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes” in an effort to “[aspire] sincerely to an international peace.”³⁰⁷ Therefore, Article 9 could be read to mean that military forces are only disallowed for the purposes of making war and using force in international disputes. Such a reading allows for the interpretation that Article 9 does not prohibit a military force that should only be used in the self-defense of the nation.³⁰⁸ Even if this legal analysis of Article 9 is sound, it still does not explain the use of the SDF in collective action in foreign countries such as that authorized by the Anti-Terrorism Special Measures Law.³⁰⁹

D. Legislative and Popular Support for Reform

Espousing legal arguments to justify the constitutionality of the SDF is clearly not enough for most Japanese legislators. This is reflected in a recent poll showing that over 80 percent of currently elected legislators in the House of Representatives, irrespective of political party, are in favor of revising the Japanese Constitution.³¹⁰ A different poll shows that 56 percent of Japanese are in favor of constitutional reform—a rise of 9 percent since 1997.³¹¹ Approximately the same percentage of respondents felt that a constitutional amendment should “clearly allow for the existence of the SDF.”³¹² Perhaps most importantly, new Prime Minister Abe is wholly dedicated to constitutional reform.³¹³ It

³⁰⁶ KENPŌ, art. 9 § 2.

³⁰⁷ KENPŌ, art. 9.

³⁰⁸ See Sakata, *reprinted in* COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, *supra* note 256, at 303-04.

³⁰⁹ See Southgate, *supra* note 187, at 1620.

³¹⁰ See *Poll Winners Keen on Postal, Top Law Reform*, DAILY YOMIURI (Tokyo), Sept. 14, 2005, available at 2005 WLNR 14470950.

³¹¹ *56% Support Revisions to Constitution*, ASAHI (Tokyo), May 3, 2005, available at LexisNexis Academic.

³¹² *Id.*

³¹³ See Nakata, *supra* note 76. Abe has stated that he would “like to draft a new

appears that, on the whole, Japan remains unconvinced that Article 9 can be satisfactorily interpreted in its current form to allow for the SDF.

IV. Constitutional Reform

Japan could make the first constitutional amendments in the nation's history. The general procedure for amendments is laid out in Article 96 of the Japanese Constitution.³¹⁴ Article 96 states that amendment requires two-thirds agreement in each house of the legislature, followed by a majority popular vote by Japanese citizens.³¹⁵ Before this can happen, however, legislators will have to develop specific procedures for initiation of a constitutional revision in the Diet and for popular referendum.³¹⁶ Steps towards the development of these procedures are already underway.³¹⁷ Despite these requirements, it would appear that Japan has an easier task of amending its constitution than that required of some other countries, such as the United States.³¹⁸

In spite of the relative ease of amending the Japanese Constitution, prior attempts to amend it have resulted in utter failure. The closest revisionists ever came to amending Article 9 was in 1956 when a proposed amendment went to vote in the Diet but "failed to obtain the two-thirds voting majority necessary."³¹⁹ In 1957, the Commission on the Constitution was established with the goal of investigating constitutional problems and preparing a draft amendment.³²⁰ However, upon the release of the final report

Constitution with [his] own hands." Onishi, *supra* note 72. . In fact, Abe expects to enact a revised Constitution within the next five years, a task he envisions taking place within his term as Prime Minister. See *Abe Seeking to Amend Top Law Within His Term*, DAILY YOMIURI (Tokyo), Nov. 2, 2006, available at LEXIS; Hiroko Nakata, *Abe Figures Five Years Needed for Constitutional Revisions*, JAPAN TIMES (Tokyo), Sept. 12, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060912a2.html> (registration required to access the article).

³¹⁴ KENPŌ, art. 96.

³¹⁵ KENPŌ, art. 96.

³¹⁶ See *Diet to Move Ahead on Top Law Reform*, DAILY YOMIURI (Tokyo), Oct. 3, 2005, available at 2005 WLNR 15844250.

³¹⁷ See *id.*

³¹⁸ See Hoftten, *supra* note 188, at 303-04.

³¹⁹ Sato, *supra* note 47, at 98.

³²⁰ See *id.*

in 1964, the Commission failed to present a consolidated view either for or against constitutional amendment.³²¹ Since then, the LDP's dream of revision of Article 9 has essentially remained on the back-burner in terms of political agenda,³²² though that appears to be changing rapidly.³²³

V. The LDP's Reform Proposal

The current LDP draft proposal for constitutional reform probably stands the best chance yet of actually becoming a constitutional amendment. As mentioned previously, there is widespread support for amendment in general, with 80 percent of at least one house of the Diet³²⁴ and 56 percent of the Japanese public approving.³²⁵ But support for constitutional amendment in general does not necessarily translate directly into votes for one particular amendment proposal, particularly in a multi-party political system like Japan's. While it is difficult to say exactly how the LDP's draft will be received, one indicator has been the level of general public support for recent LDP administrations.

Riding high on his snap election victory, Koizumi did very well in the polls immediately afterwards.³²⁶ A 2005 poll showed 62 percent popular support for Koizumi following the election, an increase of over 14 percent from the month prior.³²⁷ Fifty-nine percent of Japanese polled indicated that they felt the Koizumi administration was leading Japan "in the right direction."³²⁸ This level of support cannot be attributed to Koizumi's charisma alone—polls also showed that 61 percent indicated overall

³²¹ See *id.*

³²² See *id.* at 99-100.

³²³ See Keizo Nabeshima, Op-Ed, *Toward a New Constitution*, JAPAN TIMES (Tokyo), Oct. 17, 2005, available at <http://search.japantimes.co.jp/print/ea20051017kn.html> (describing recent cross-party movements towards consensus on constitutional amendment) (registration required to access the article).

³²⁴ *Poll Winners Keen on Postal, Top Law Reform*, *supra* note 310.

³²⁵ *56% Support Revisions to Constitution*, *supra* note 311.

³²⁶ See *Koizumi's Popularity Back Over 60%*, DAILY YOMIURI (Tokyo), Sept. 21, 2005, available at LEXIS.

³²⁷ *Id.*

³²⁸ *59% Believe Japan's Politics on Right Track*, DAILY YOMIURI (Tokyo), Sept. 28, 2005, available at 2005 WLNR 15299235.

approval of Koizumi's executive cabinet.³²⁹

Despite the LDP's wealth of public support, due to the requirement that an amendment receive two-thirds vote in both houses of the Diet, "[c]onstitutional amendments could not be proposed without the support of the [Democratic Party of Japan (DPJ)]," the leading opposition party.³³⁰ Together, the two parties account for over 80 percent of each house of the Diet.³³¹ While the former leader of the DPJ, Maehara, had a decidedly pro-amendment stance, the DPJ is unlikely to agree with the LDP on every matter.³³² The DPJ has a more limited concept of the SDF, arguing for a "'restricted right of self-defense' for the nation under the U.N. charter," with pacifism explicitly remaining "the guiding principle for Japan."³³³ Furthermore, Maehara has argued that there should be constitutional guarantees that "war is renounced . . . and [Japan's] forces will never be used overseas."³³⁴

Unlike the DPJ, the LDP argues for a much more expansive definition of the SDF and Japan's right of self-defense in their new proposal.³³⁵ Indeed, the new draft officially renames the SDF and explicitly refers to the maintenance of a "self-defense military."³³⁶ This change is of particular interest because it would mark the first time since the end of WWII that Japan has referred to its own

³²⁹ Poll: *Support for Cabinet Edges Up*, DAILY YOMIURI (Tokyo), Nov. 15, 2005, available at LEXIS.

³³⁰ Nabeshima, *supra* note 323.

³³¹ *See id.*

³³² *See id.* In 2006, Maehara was replaced by Ichiro Ozawa, a figure not friendly to the LDP. *See* Masami Ito, *DPJ Approves New Leadership as Ozawa Vows to Unseat LDP*, JAPAN TIMES (Tokyo), Apr. 12, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060412a5.html> (registration required to access the article).

³³³ *DPJ Approves New Leadership as Ozawa Vows to Unseat LDP*, *supra* note 332.

³³⁴ *Koizumi Wants Legal Basis for Military*, JAPAN TIMES (Tokyo), Oct. 31, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051031a1.html> (registration required to access the article).

³³⁵ In addition to seeking an expanded military, the LDP also adds additional rights in their new draft constitution, such as the right to a clean environment. *See Self-Defense Right Guaranteed by Draft*, *supra* note 17. In an apparent attempt to respond to judicial criticism of Koizumi's Yasukuni visits, the draft also "implicitly allows government officials to support religious activities within the bounds of social courtesy, manners[,] and customs[.]" *Draft Revision Tosses Principles Aside*, *supra* note 6.

³³⁶ *Self-Defense Right Guaranteed by Draft*, *supra* note 17.

armed forces as a military.³³⁷ Koizumi explained the change, stating that though Japan will “never wage a war[, the constitution] should clearly state a possession of troops for self-defense so they’re not misunderstood as unconstitutional.”³³⁸ In other words, the LDP aims to resolve the decades old debate about whether or not the SDF is unconstitutional by clearly stating in the new constitution that the force is not only within the law, but is now a constitutional requirement.

In order to achieve these aims, the new LDP draft first has re-titled the second chapter “from ‘Renunciation of War’ to ‘National Security.’”³³⁹ While the first paragraph has remained untouched, the second paragraph has been “drastically re-written.”³⁴⁰ The existing language of the second paragraph, stating that “‘land, sea, and air forces, as well as other war potential, will never be maintained’ and ‘[t]he right of belligerency of the state will not be recognized’” has been removed altogether.³⁴¹ In its place, the draft uses the aforementioned language referring to the maintenance of a self-defense military.³⁴² Finally, the “draft allows for the exercise of all rights of self-defense, including forming military alliances with other countries and deploying [military forces] overseas while engaging in ‘international cooperation activities for the purpose of securing international peace.’”³⁴³

The new draft also undertakes substantial changes which some have referred to as “conservative” and “nationalistic[,]” to the preamble.³⁴⁴ Presumably in response to criticism of the current constitution’s foreign-influenced origin, the preamble begins by definitively stating that the “Japanese people, based on their own will and determination, establish a new Constitution.”³⁴⁵ Similarly to the current constitution, albeit much more succinctly, the new

³³⁷ See Auer, *supra* note 4, at 176-77.

³³⁸ Freire, *supra* note 2.

³³⁹ *Self-Defense Right Guaranteed by Draft*, *supra* note 17.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ See *LDP Preamble Sets Nationalistic Tone*, ASAHI (Tokyo), Oct. 7, 2005, available at LexisNexis Academic.

³⁴⁵ *Draft Revision Tosses Principles Aside*, *supra* note 6.

draft states that “[b]asic principles—the idea of popular sovereignty, democracy, liberalism, respect for basic human rights, pacifism[,] and the idea of international harmony—shall be inherited as inalterable values.”³⁴⁶ The new preamble also says “[s]incerely wishing for international peace based on justice and order, the Japanese people will cooperate with other nations to realize it. While recognizing the existence of a variety of values in the international community, the people will make incessant efforts to eliminate oppression and the violation of human rights.”³⁴⁷

In a move that some say undermines the principle of pacifism and ignores the lessons of Japan’s past, the new draft preamble removes the post-war language “‘never again shall we be visited with the horrors of war through the action of government.’”³⁴⁸ Furthermore, the new preamble states that “[t]he Japanese people share a duty to support and defend the nation and society they belong to with love, a sense of responsibility[,] and mettle.”³⁴⁹ The reference to the love of the nation reminds some of language used in Japan’s nationalistic past.³⁵⁰

In short, these changes allow Japan to follow the lead of the United Kingdom and Australia through active participation with the United States and the United Nations in various international military and peace-keeping endeavors. As Koizumi indicated, this is in response to a “need to take up the challenges of strife and conflict that may face international society over the next [fifty] years.”³⁵¹ At the same time, the new draft seems like an attempted representation of a modern Japan which is finally ready to toss off the remaining vestiges of post-war culpability and guilt and enter the arena of international cooperation unhampered. Keenly aware of the equivalent temporal gaps between the Meiji Restoration, the end of WWII, and the introduction of this new draft, Koizumi referred to his party’s proposal as Japan’s third “miracle”

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ See *LDP Preamble Sets Nationalistic Tone*, *supra* note 344.

³⁵¹ See Carl Freire, *Japan Considers Military Change*, CHARLOTTE OBSERVER (Charlotte, NC), Nov. 23, 2005, at 6A.

reform.³⁵²

VI. Analysis and Recommendations

Arguments of constitutionality aside, it is clear that Japan's current armed forces are in opposition to the original intent of Article 9. Japan largely appears to recognize this fact, as evidenced by the overwhelming legislative support and growing popular support for constitutional reform. In response to this conflict, Japanese lawmakers have three options. First, the current uneasy balance can be maintained. Second, the SDF can be abolished or severely restricted. Third, the constitution can be reformed to clearly allow for a military force. The LDP is currently proposing the last option.

The first alternative—to maintain the status quo—is an increasingly unfavorable option. The status quo option is apparently more and more distasteful to Japanese lawmakers.³⁵³ This is evident from the fact that all of the largest Japanese political parties support constitutional reform, though they disagree on the degree of change.³⁵⁴ Making no change is incompatible with several current trends in Japan, including the continued growth of the SDF, the United States' demands for a more independent military, and Japan's desire to participate in international humanitarian and collective defense operations. In short, the chasm between the original intent of Article 9 and the modern SDF continues to widen and Japan is finally coming to the realization that this divergence needs to be addressed directly.

The second alternative of adhering to Article 9's original intent is an entirely impractical option. Doing so would involve the most effort of the three possible solutions, because it would require dismantling or severely limiting the SDF. Despite such drawbacks, there are some who advocate transforming the SDF from a quasi-military force to a simple disaster relief organization.³⁵⁵ While the change may draw applause from pacifists in Japan and most of Japan's East Asian neighbors, such

³⁵² See *'Miracle' Reforms Now the LDP's Main Mission*, *supra* note 167.

³⁵³ See *Poll Winners Keen on Postal, Top Law Reform*, DAILY YOMIURI (Tokyo), *supra* note 310.

³⁵⁴ See Nabeshima, *supra* note 323.

³⁵⁵ See Port, *supra* note 13, at 160.

a drastic shift would entail serious risks as well. It is clear that the cooperative military defensive relationship between Japan and the United States is based on a strategy of deterrence for unchecked military growth in Asia.³⁵⁶ Statements from the United States pushing for an increasingly capable Japanese armed forces³⁵⁷ suggest that the United States would not be willing to return to the non-mutual defensive relationship that followed WWII.³⁵⁸ Any major shift in the relationship would likely exacerbate the already volatile military tensions in the region. An insufficiently defended Japan could become a vulnerable target for aggression from abroad.

In this analysis, it is important to remember Shidehara's original argument for an absolute Article 9³⁵⁹—a truly pacifistic Japan could serve as an ideal for the rest of the world. But “Japan does not exist in a vacuum[,]”³⁶⁰ and it would be a mistake to look at Japan's post-war success in isolation. Instead, it should be considered in the context of the defensive support provided by the United States, support that the United States is gradually withdrawing in the expectation that Japan will provide more for its own defense.³⁶¹ While dissolving the SDF would adhere to the admirable principles originally enshrined in Article 9, it may well be that such a resolution would prove untenable.

In the end, the third option—amending the constitution to allow for a full-fledged military force, may be the best option. Although constitutional reform was once thought to be virtually

³⁵⁶ See *Interim Report Stresses Defense Cooperation Between Japan, U.S.*, *supra* note 244.

³⁵⁷ See Konishi, *supra* note 236.

³⁵⁸ Japan is certainly aware of its heavy reliance on the United States and the importance of that strategy in terms of its overall international diplomatic strategy. See Editorial, *Tightening the Knot*, ASAHI (Tokyo), Nov. 18, 2005, available at LexisNexis Academic.

³⁵⁹ See Takayanagi, *supra* note 184, at 86.

³⁶⁰ Fisher, *supra* note 20, at 430.

³⁶¹ “Japan will either become a ‘normal’ ally or risk being set free to look after itself. Normal alliances are willing to fight if necessary.” Robyn Lim, Editorial, *Missile Defense Will Define Japan-U.S. Security Alliance*, JAPAN TIMES (Tokyo), Oct. 14, 2005, available at <http://search.japantimes.co.jp/cgi-bin/eo20051014r1.html> (registration required to access the article).

unattainable,³⁶² it now appears to be a possibility.³⁶³ In addition to the concerns mentioned above, the surge in Japanese nationalism may also lend support to the classic criticism that Japan's current constitution sounds like a "poor translation."³⁶⁴ One of the most vocal critics of the linguistic qualities of the constitution has been Yukio Mishima, novelist, playwright, and literary master of modern Japan.³⁶⁵

Mishima was acutely aware of the intrusion of foreign influence into classic Japanese written language, and in his exploration of the issue he used the phrase *hon'yaku bun*, or "language resulting from the act of translation[.]"³⁶⁶ According to Mishima, the constitution is a particularly egregious example of *hon'yaku bun*; he stated that it is "a truly monstrous, hideous prose, and not a few people must have felt the sorrow of the Occupied at the fact that it became the Japanese Constitution."³⁶⁷ Perhaps it was because of this sorrow that the constitution was never subjected to popular referendum at its introduction, and so it has remained to this day.³⁶⁸

It is easy to sympathize with a nation desiring a constitution clearly derived from its own language, as opposed to one where "any . . . [reader] can perceive its foreign origin."³⁶⁹ It is also easy

³⁶² "The chance of passing such an amendment . . . is . . . extremely unlikely." Fisher, *supra* note 20, at 427.

³⁶³ See *56% Support Revisions to Constitution*, *supra* note 311.

³⁶⁴ See *Constitutional Revision: The LDP Apparently Put Off Debate On Article 9*, *supra* note 48.

³⁶⁵ Regarded during his lifetime as a candidate for a Nobel Prize for literature, Mishima ended his life after several decades of phenomenal success by committing ritual self-disembowelment, known as *seppuku*, after failing to incite SDF troops to revolt. See *Mishima Still Intriguing 35 Years After His Death*, ASAHI (Tokyo), Nov. 28, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation). In regards to his own interpretation of Article 9, Mishima said "[t]he Self-Defense Forces are obviously unconstitutional[.]" Hiroaki Sato, Editorial, *Constitutional Debate Welcome*, JAPAN TIMES (Tokyo), Sept. 26, 2005, available at <http://search.japantimes.co.jp/print/ea20050926hs.html> (registration required to access the article).

³⁶⁶ Sato, *supra* note 365.

³⁶⁷ *Id.*

³⁶⁸ "[T]he Japanese Government did not want to go to its people for a referendum on the new Constitution." Hamano, *supra* note 3, at 440.

³⁶⁹ Early criticism of the LDP draft has called it "unexpectedly bland . . . [having been] watered down in the hope that it would be more acceptable" to the major political

to sympathize with a national desire for a popular referendum on the constitution that is meant to represent them. When considering these issues in conjunction with the resolution that a constitutional amendment could bring to the constitutional conflict surrounding the SDF, a new constitution emerges as the best solution.

Additionally, the introduction of the new LDP draft comes sixty years after the end of WWII. Japan has experienced drastic positive changes since that time, transforming from a recipient of international aid to one of the world's largest donors.³⁷⁰ It could be argued that Japan's post-war limitations should now be removed, allowing Japan to take its place unfettered among the ranks of powerful, educated, and law-abiding nations of the world striving for a unified peace through expression of mutual self-interests.

Japan has essentially already made this argument, albeit in a different context, in its bid to become a permanent member of the United Nations Security Council.³⁷¹ As the world's second largest economy,³⁷² Japan contributes more than the aggregate of all other permanent Security Council members, save the United States.³⁷³ Japan's bid for a permanent seat, which was combined with similar efforts from Brazil, Germany, and India, was ultimately unsuccessful, but it can be seen as another example of Japan's efforts to finally break the mold set in place for it at the end of WWII.³⁷⁴

parties. *Constitutional Revision: The LDP Apparently Put Off Debate on Article 9*, *supra* note 48.

³⁷⁰ See Wolfowitz, *supra* note 10.

³⁷¹ Osamu Kawakami, *Govt Seeks Fairer Deal on U.N. Dues/Contribution Larger Than Total of All UNSC Permanent Members, Except U.S.*, DAILY YOMIURI (Tokyo), Sept. 12, 2005, available at 2005 WL 14352013.

³⁷² See Cortazzi, *supra* note 27.

³⁷³ "The current contributions as a proportion of the total U.N. budget of the five permanent members of the U.N. Security Council are 22 percent for the United States, 6.13 percent for Britain, 6.03 percent for France, 2.05 percent for China[,] and 1.1 percent for Russia. Japan contributes 19.47 of the total U.N. budget[.]" Kawakami, *supra* note 371. Nevertheless, as a part of its Security Council seat bid, Japan gave 45 billion yen in aid to devastated Pacific nations in 2006. See *Japan Aids Pacific Nations, Wins Support for UNSC*, JAPAN TIMES (Tokyo), May 28, 2006, available at <http://search.japantimes.co.jp/print/nn20060528a1.html> (registration required to access the article).

³⁷⁴ Japan's efforts were also not without criticism, particularly from China. See

Despite the benefits of a constitutional amendment that explicitly allows a military force, evaluation of such a remedy should not exclude consideration of the larger political context, particularly that of East Asian diplomatic relationships. The relationship between Japan and its closest neighbors is rapidly deteriorating and unsurprisingly Japan's neighbors would not look favorably on such an amendment.³⁷⁵ In fact, introducing such a drastic change "at a time when East Asia faces potential crises such as North Korea's nuclear-weapons development and a military clash between China and Taiwan"³⁷⁶ could prove disastrous for Japan.

For these reasons, any amendment process to the Japanese Constitution to explicitly allow a military would be greatly enhanced by including several important qualifications. First, as suggested by former DPJ President Maehara, the amendment could stipulate that Japan only has the right to exercise collective defense in a limited way.³⁷⁷ As the Japanese realized at the drafting of the original Article 9, self-defense can easily be used as a justification for initiation of war.³⁷⁸ The risk is particularly great where a self-defense force has the right to conduct collective defense operations on the high seas and foreign soil. Accordingly, in order to help allay the concerns of the previous victims of Japanese aggression, any amendment should make clear that the military force is explicitly for national self-defense and international humanitarian aid purposes. The constitution should also state that it will only allow international operations that have been authorized by the United Nations.

Second, the drafters of constitutional amendment should

Opinion, *Japan Needs Qualification: Commentary*, PEOPLE'S DAILY (Beijing), Sept. 26, 2004, available at http://english.peopledaily.com.cn/200409/26/eng20040926_158336.html. "The [U.N.] Charter does not regulate in its clauses that its permanent Security Council membership is decided by the amount of a country's donation to the world body. . . . [The U.N.] is neither a club for the rich nor a board of directors organized by its shareholders." *Id.*

³⁷⁵ See *Japan Should Wake Up to History*, *supra* note 52.

³⁷⁶ Editorial, *Caution Needed in Defense Relations*, JAPAN TIMES (Tokyo), Nov. 1, 2005, available at <http://search.japantimes.co.jp/cgi-bin/ed20051101a1.html> (registration required to access the article).

³⁷⁷ See *Koizumi Wants Legal Basis for Military*, *supra* note 334.

³⁷⁸ See Port, *supra* note 13, at 143.

include a specific acknowledgment of responsibility and apology for Japan's past military transgressions and a sincere statement of commitment to avoiding such errors in the future. Ideally, both concepts should be included in the new preamble and revised Article 9 itself. It is a mistake for Japan to think that time alone has "settled [Japan's] wartime account."³⁷⁹ Rather, the new constitution could be an ideal opportunity to passionately and unambiguously make clear that Japan remembers the war and accepts responsibility for it, that Japan apologizes for its actions during that time, that these new changes are only directed at an effort towards international peace, and that Japan forever renounces the military aggression of its imperialist past.

Third, along with efforts to amend the constitution, the Japanese government would greatly further its cause by concurrently making efforts to resolve the international tension surrounding the Yasukuni shrine and history textbook issues. While having the appropriately conciliatory language in the new constitution is critical, "Tokyo must [also] back [its] words with actions."³⁸⁰ Particularly if Japan seeks to remove the war renunciation language that many abroad see as Japan's greatest existing statement of war apology,³⁸¹ Japan ought not at the same time continue to ignore the already "high and rising international price" of actions which undermine the sincerity of its war apologies.³⁸²

The Japanese government could accomplish this by undertaking two actions. First, it could develop a secular war memorial to act as a permanent replacement to official visits to the Yasukuni shrine or follow other suggestions to defuse the Yasukuni issue. This would allow Japanese politicians to maintain a respectable posture with the Japanese public by continuing to pay respects to the war dead. At the same time it would appease the international community, which is outraged by continual acts of reverence for convicted Japanese war criminals. Second, the Japanese government could establish a commission to investigate the historical accuracy and honesty of the contents of history

³⁷⁹ *Japan Should Wake Up to History*, *supra* note 52.

³⁸⁰ Xiao, *supra* note 58.

³⁸¹ See Yoshitake, *supra* note 78.

³⁸² Glosserman, *supra* note 84.

textbooks in Japanese schools. If Japan refuses to correct the information in textbooks that tends to downplay Japan's war responsibility it sends the message to the international community that Japan does not desire subsequent generations to be fully aware of the extent of their nation's past culpability.

A positive relationship between Japan and its Asian neighbors is preferable for all parties.³⁸³ While a revamped constitution that once again allows for the existence of a Japanese military will certainly create ripples abroad, a domestic paradigm shift to "face history squarely and honestly" could help alleviate those tensions.³⁸⁴ Otherwise, the constitutional amendment would only exacerbate an already deteriorating situation.

Unfortunately, the LDP's current efforts towards amendment follow virtually none of the aforementioned recommendations. While the draft does state that the military will be for self-defense purposes, those purposes are all but explicitly unlimited by the surrounding language.³⁸⁵ Current Prime Minister Abe has made clear that he supports a Japanese right of collective self-defense³⁸⁶ as well as a general expansion of Japan's defense capability.³⁸⁷ The fact that the self-defense military could operate overseas and form alliances with any country of its choosing is unlikely to do anything but confirm the fears of the previous victims of Japanese aggression. Additionally, while the draft preamble does include the principle of pacifism as an inalienable right, at the same time it removes compelling language from the existing constitution about Japan's steadfast determination to avoid war at all costs in the future.³⁸⁸ Indeed, the draft preamble and Article 9 appear to "bur[y] lessons from Japan's modern war."³⁸⁹ In its place is

³⁸³ See Opinion, *Japan Must Face Up to History*, PEOPLE'S DAILY (Beijing), May 13, 2004, available at http://english.peopledaily.com.cn/200405/13/eng20040513_143145.html.

³⁸⁴ *Id.*

³⁸⁵ See *Draft Revision Tosses Principles Aside*, *supra* note 6; *Constitutional Revision: The LDP Apparently Put Off Debate on Article 9*, *supra* note 48.

³⁸⁶ See *Abe Eager to Push Debate Over Right to Collective Self-Defense*, ASAHI (Tokyo), Sept. 6, 2006.^t

³⁸⁷ See Yoshida, *supra* note 101.

³⁸⁸ See *Draft Revision Tosses Principles Aside*, *supra* note 6.

³⁸⁹ *Id.*

language that appears instead to rally Japan around the flag—sentiments sure to incite apprehensions abroad.³⁹⁰

Finally, the Japanese government does not appear to be taking any steps towards resolving the Yasukuni or history textbook issues. In fact, the government appears to be all but ignoring the problem. When United States President George Bush recently asked Koizumi about China, “Koizumi said: ‘Japan-China relations have become stronger in various areas,’ as if to imply there is no cause for concern.”³⁹¹ Furthermore, commentators have suggested that the language in the draft that allows government officials’ support of religious activities was specifically written to remove any domestic legal hurdles for future Yasukuni visits by public officials.³⁹² There appears to be little progress investigating an alternative, secular memorial.³⁹³ With successor Prime Minister Abe suggesting that he would continue to visit Yasukuni, the problem is only going to get worse.³⁹⁴ The same can be said about the textbook problem, since the most glaringly offensive books are only increasing in circulation, and this success is having a “ripple effect” with other publishers who have started toning down their descriptions of wartime atrocities as well.³⁹⁵

VII. Conclusion

Although the Japanese judiciary appears unwilling to address the issue the Japanese government has made many assurances to the contrary, the modern SDF simply cannot comport with the pacifist notions present in the Constitution of Japan. This implicit limitation is apparently clear to the Japanese legislature, considering the large numbers of the body who either wish to

³⁹⁰ *Id.*

³⁹¹ *Tightening the Knot*, *supra* note 358.

³⁹² *See Draft Revision Tosses Principles Aside*, *supra* note 6.

³⁹³ It has been suggested that the main reason for this is that Koizumi “loathes being told what to do.” *See Koizumi’s Scorn Further Delays Study of New War Memorial*, ASAHI (Tokyo), Dec. 24, 2005 (on file with the North Carolina Journal of International Law and Commercial Regulation).

³⁹⁴ *See Koizumi Reshuffles Cabinet/3 Possible Successors—Abe, Aso, Tanigaki—Get Key Posts*, *supra* note 102.

³⁹⁵ *See Nakamura*, *supra* note 127.

severely limit the SDF or modify the constitution to allow for a transformation into an official military force. It now appears possible that amendment proponents will be able to dilute the draft language in order to satisfy enough political parties to actually arrive, for the first time since its inception, at a popular referendum on a new Japanese constitution.

On the one hand, this gives the Japanese people a wonderful opportunity to work together to create a constitution that is entirely their own. On the other hand, the LDP's current direction will ultimately work against critical diplomatic relationships with Japan's closest neighbors. Although Japan's desire to step beyond the shadow of its dark wartime past is certainly understandable, in the interests of international peace and prosperity, Japan would do well to openly and humbly shoulder the responsibility of its own history. If it does not do this, but instead continues down the path of ardent nationalism, any amendment to the Constitution of Japan that removes the war renunciation clause could potentially enflame regional tensions. Not only would Japan's own national security interests be at stake, but regional and even world peace could hang in the balance. In order to avoid a potentially tragic outcome, Japan should do the right thing and swallow its pride. Only then can the large-scale national reforms that are currently sweeping Japan avoid further destabilizing an already volatile region.

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